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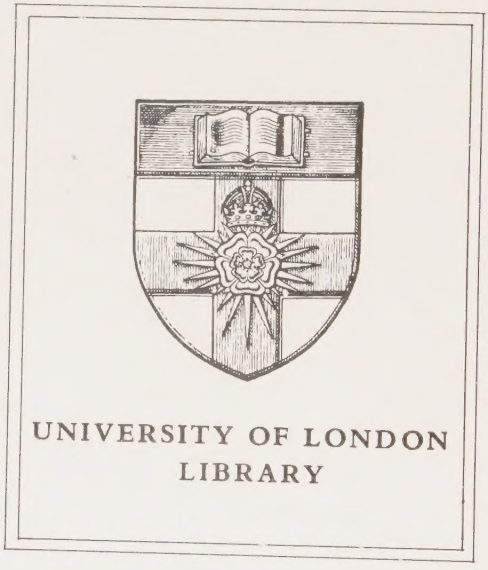

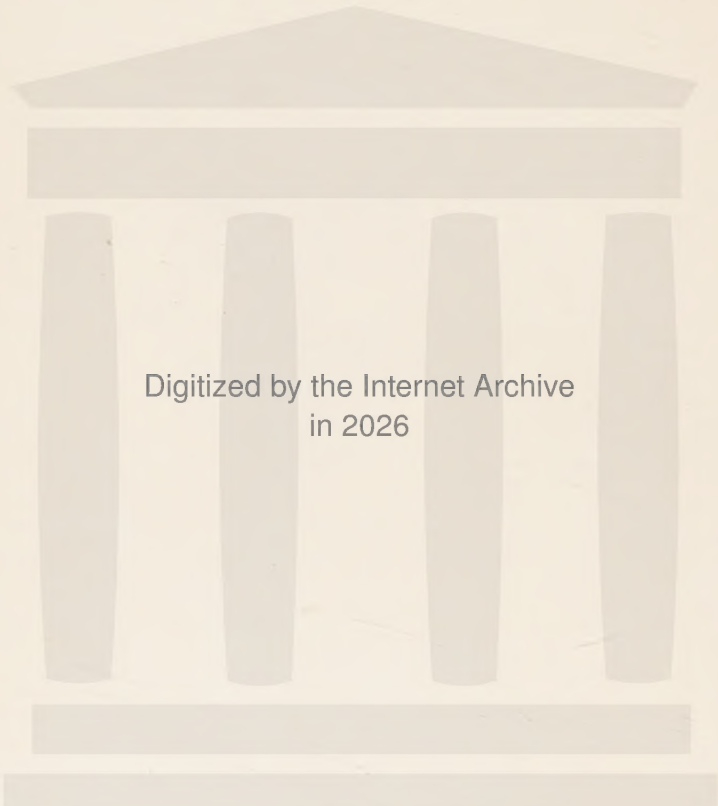

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THE CRIMINAL APPEAL REPORTS

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THE
CRIMINAL APPEAL REPORTS
1955

EDITED BY

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SELLERS

MICHAL ONUFREJCZYK

1955
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Murder—Corpus Delicti—No Body nor Trace of Body Found—No Confession by Prisoner of any Participation in Murder—Death Provable by Strong Circumstantial Evidence.

On a charge of murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the prisoner has made no confession of any participation in the crime. Before the prisoner can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt. The circumstantial evidence should be so cogent and compelling as to convince a jury that on no rational hypothesis other than murder can the facts be accounted for.

HORRY [1952] N.Z.L.R. 111 followed.

Appeal against conviction.

The appellant was convicted at Glamorganshire Assizes on December 1, 1954, after a trial lasting twelve days, of murder and was sentenced by Oliver J. to death.

The appellant, who was a Pole, carried on a farm in Carmarthenshire in partnership with another Pole named Sykut. By November, 1953, the appellant was in financial difficulties and was trying to borrow money from various sources. Sykut was desirous of terminating the partnership and was willing to sell his share in the farm to the appellant for £700; failing that, he desired that the farm be put up for sale. The appellant and Sykut had been to a solicitor in Llandilo to discuss their difficulties, and there was some evidence of quarrelling between the appellant and Sykut. By December 14, 1953, no conclusion about the sale of the farm had been reached. On that day Sykut completely disappeared, and no trace of him or of

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his body or clothing was found. The last person known to have seen him alive was the appellant. Letters from Sykut's wife in Poland came to England for some time after Sykut's disappearance. The appellant subsequently gave a number of conflicting accounts with regard to Sykut's alleged movements.

The further relevant facts of the case and the relevant portions of the summing-up appear fully in the judgment.

Elwyn Jones, Q.C. and *Jenkin Jones* for the appellant: There was no satisfactory proof of a *corpus delicti*. There can be no such proof unless either a body is found or an account has been given of the death of the person alleged to have been murdered. The authorities with regard to circumstantial evidence relating to the *corpus delicti* show how far the judges have gone in order to avoid the hideous situation of a person being convicted of the murder of someone who might still be alive.

[He referred to HOPKINS (1838) 8 C. & P. 591; CHEVERTON (1862) 2 F. & F. 833; BURTON (1854) Dears. 282; CLEWES (1830) 4 C. & P. 221; and FRANZ (1861) 2 F. & F. 580.] In one of the most recent cases DAVIDSON (1934) 25 Cr.App.R. 21 the evidence came from the prisoner himself in the form of a confession which he subsequently sought to retract. All these cases are consistent with the principle laid down long ago by Sir Matthew Hale (2 Pleas of the Crown 290) that there must be either the production of the body or some direct proof of the killing which, it is submitted, is still good law. There is no case to be found in the books where there has been a conviction of murder in the absence of such direct proof; in all cases where there has been a conviction there has been some direct evidence, slight though it may be, of the *factum* of murder. Here there was no evidence at all of the death of Sykut.

H. Edmund Davies Q.C., *W.L. Mars-Jones*, and *E. S. Y. Lewis* for the Crown were not called on.

THE LORD CHIEF JUSTICE: The appellant, who is a Pole, and has been in this country since 1947, was convicted before

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Oliver J. at the last Assizes at Swansea of the murder of another Pole, his partner.

The trial lasted for some twelve days and the case was summed up with meticulous care by the learned judge, who analysed the evidence in a masterly fashion. The principal question that has been argued on this appeal is whether there was proof of what the law calls a *corpus delicti*, for the remarkable fact about this case is—and it has remained remarkable and unexplained—that the body of the man alleged to have been murdered, who was last seen, so far as anybody knows, on December 14, 1953, has completely disappeared and there is no trace whatever either of him or his clothes or his ashes.

It has been submitted to us that the law is that unless the body can be found or an account given of the death there is no proof of a *corpus delicti*. *Corpus delicti* means, first, that a crime has been committed, that is to say, that the man to whom the charge relates is dead, and his death has been caused by a crime. As Lord Stowell pointed out a great many years ago in a matrimonial case, one does not begin to inquire whether the prisoner is guilty of the crime until it has been established that a crime has been committed.

Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder and there has been no trace of the body at all.* But it is, we think, equally clear that the fact of death can be proved, as any other fact can be proved, by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided the jury are satisfied and are warned that it must lead to one conclusion only. Oliver J. began and ended his summing-up to the jury with the direction he took, saying that it was as clear a direction as he could give, from HORRY (1952) N.Z.L.R. 111, which was before the New Zealand Court of Appeal in 1951. The headnote of that case is: "At

* In DAVIDSON (1934) 25 Cr.App.R. 21 there was a conviction of murder, although no trace of the body of the boy alleged to have been murdered had been found, and the Court of Criminal Appeal affirmed the conviction; but in that case the prisoner had prior to the trial made a confession that he had killed the boy, and sought at the trial to retract that confession.

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the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

Speaking for myself, I entirely agree with that as a statement of law except that I would not use the words "morally certain." I would say "such circumstances as render the commission of the crime certain." I myself think it is always a pity in dealing with matters of evidence to use epithets either for the purpose of increasing its value or decreasing its value; and when in cases in the books somebody uses the expression "a high degree of certainty" or "strong evidence" and words of that sort, he really adds nothing to what the law requires. The law requires a case to be proved and a jury is told that they have to be satisfied on the evidence that the crime is proved and that the prisoner is guilty of the crime, and they should be told that if when they have heard the evidence they are not satisfied, and do not feel sure that the crime has been committed, or that the prisoner has committed the crime, then their verdict should be Not Guilty. Let us leave out of account, if we can, any expression such as "giving the prisoner the benefit of the doubt." It is not a question of giving the benefit of the doubt; if the jury are left with any degree of doubt whether the prisoner is guilty, then the case has not been proved.

Oliver J., having read that statement of the law to the jury, said: "It is indeed a grave step to find a murder proved when there is no body, but it is not the law, and I do not believe it has ever been the law; it is certainly not the law today that if a body can be got rid of so that no trace of it can be found,

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a murderer who has done so is not to be convicted. That is not the law. But, of course, the burden of proving everything against the man is upon the Crown. There is no burden on him to disprove anything. I think the most helpful way I can bring this to your minds is to say this. If Onufrejczyk had not given evidence at all in this case, and all you had was the case for Crown, would you be satisfied with that case unanswered, the case for the Crown? If you would, then you will proceed. But if you were, for instance, to come to the conclusion that the case for the Crown standing uncontradicted was not good enough—suppose you took that view—then you need not go on to consider Onufrejczyk's explanation; there is no burden upon him." A little later on, before he turned to the details of this remarkable case, he said this: "If he did not die by natural causes, he was killed. Members of the jury, if he was killed, his body was concealed or destroyed and has not been found. If he is dead and was killed and the body was destroyed or concealed he was murdered, was he not? That is the point. I want you to apply your minds to that set of circumstances and decide for yourselves whether in the light of these facts, and many more to which I shall have to draw your attention, you can say you are satisfied that no rational hypothesis except that he is dead, dead by violence, is open. If you are driven to that conclusion, that would be a verdict of murder; but if you think that would be going too far and that you could not safely say that no rational explanation of his death except murder could be conceived, why then it will mean you have a doubt about it and you will acquit him." I do not think that Mr. Elwyn Jones, for whose assistance in this case and for whose forceful and temperate argument the court is much indebted, would quarrel with that direction of the learned judge which seems to me as ample and as fair to the accused man as it is possible to conceive.

Sir Matthew Hale, who was writing at the end of the seventeenth century, says in his *Pleas of the Crown*, Volume 2 at page 290: "I would never convict any person of murder

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or manslaughter, unless the fact were proved to be done, or at least the body found dead." He says that one must prove the fact of the murder or at least that the body has been found. He does not say, though he is very often quoted as though he had said it, that one cannot convict a man of murder unless one can produce the body. One has to remember, I think, especially as there have been dicta of other judges in the earlier and middle part of the last century which give some colour to the idea that the court will always require in a case of murder or manslaughter the production of the body, that the circumstances of these days are different from what they were when Sir Matthew Hale wrote. When Sir Matthew Hale wrote, there was no police force; there was nothing except a watchman in a town and a parish constable, who might have been an old infirm man of seventy or eighty, in the country. There was no police force at all. There was no telegraph; there were no motor-cars; there was no aliens' legislation such as we now know. There was no means of seeing that aliens were registered and did not get out of the country without permission once they were here. It would be, therefore, a strong thing indeed were any court to lay down that without production of the body or accounting for it by somebody who had seen it or seen the murder committed or something of that sort, a murderer could not be convicted.

The case against the appellant was that he and Sykut had a farm, the farm was a failure, and the appellant had come to the end of his resources. He was in dire need of money; of that there cannot be any doubt—his own letters show that. He was trying to borrow money from this person and that person, that relation and near friend, and failed every time. He had actually got to the point when he was obviously considering fraud, because he was hoping to get a valuer who would overvalue the farm so that he might be able to raise more money on mortgage from his bank. Meanwhile, Sykut wanted to break off his association with the appellant. There was a suggestion that he should be paid out. Sykut had invested his money

in this farm and was willing to sell his share for £700 if he could get it from the appellant, and, if not, Sykut said that the farm had to be put up for sale. They had been to Mr. Roberts, a solicitor of Llandilo, and their difficulties had been discussed before him. There was evidence—I do not think, speaking for myself, it was anything like so strong or convincing evidence pointing towards murder as much of the other evidence—that these men had quarrelled. Nothing had happened by December 14 with regard to any conclusion between these two men about the sale of the farm. Whether the appellant had any money at this time beyond perhaps a few shillings or it may be a few pounds is not clear, but it seems clear that he had nothing at all to enable him to pay out his partner. The appellant was very anxious to avoid the sale by auction and wanted to get the whole farm, because, I suppose, he thought that, if he had the whole of it, he could make a satisfactory business out of it.

On December 14, Sykut disappeared, not only from Carmarthenshire, not only from England but, so far as is known, from the face of the earth. Letters came from Poland from his wife after his complete disappearance when there would have been ample time for him to have got back to Poland and get in touch with his friends, which would seem to show that he had not got back to Poland, and the last person who is known to have seen Sykut is the appellant.

The appellant's activities after December 14 were certainly very remarkable. On the 18th, there was evidence, and very strong evidence, that the appellant must have posted a letter to a Polish woman living not very far away not later than a quarter to five, or it may have been five o'clock. He said in that letter: " My case is already completed, but I must if only for a few hours pop in to London to take from my acquaintances money. I gave my partner the gross of the money "—I suppose that means the larger part of the money—" because I borrowed for a few weeks, only I must sell what is possible. So beg you very much to help me in this matter and I will be very grateful,

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at the moment this is all for now, the rest we talk over when Mrs. comes over. Beg you to enquire whether it is possible to sell the poultry alive before the holidays, as I must have at least part of the money to begin something and may be some of the cattle. Hand kisses, expecting as soon as possible to see you because my partner is leaving for 14 days and might change his mind. Please don't wait a moment because it might be too late." There he is saying that he has fixed up matters with his partner, that he has paid him the most part of the money and he is expecting him to go away for a few days. What we know is that the appellant went up to London and was trying by every means in his power to borrow money from relatives up there to enable him to pay off his partner. He was getting a woman who came and gave evidence and evidently impressed the learned judge, to forge, there is no other word for it, though she may not have known she was forging, documents purporting to be agreements, and so forth, and then adding a signature to them which purported to be the signature of Sykut, and giving all sorts of contradictory accounts. When he was reduced to having to give an account of how his partner disappeared, he told the sort of story you may see in a magazine or a detective story or a story by the late Phillips Oppenheim, of how a large, dark car, sometimes described as black and sometimes as green, had arrived at his lonely farm at 7.30 at night, finding its way up a dreadful rocky path, and in the car were three men, one of whom had a revolver, and the unfortunate Sykut was put into that car and driven away at the point of the revolver. A story like that was told and yet, remarkably enough, on December 18, a sheriff's officer had gone to the farm to levy an execution before seven o'clock at night. The execution was against the appellant alone, and when he came to the place where they were carrying on business, the officer had to see that he was not levying on partnership property, so he naturally asked: "Where is Mr. Sykut?" and he was told: "Oh, Sykut has gone to a doctor at Llandilo." He never went to a doctor at Llandilo according to the evidence

that was given, but at 7.30 that night he was supposed to be kidnapped and taken to London. Then the appellant said in his evidence to the court that he was expecting his partner back at the farm, and yet all the letters he wrote then seem to say that his partner has gone to Poland and that he is not going to see him back. He was writing letters that can only be explained on the footing that he knew perfectly well that his partner could never turn up again.

It seems to me that one of the matters of the greatest possible importance is that when the appellant was in London and was telling all sorts of contradictory stories to the people from whom he was trying to borrow money, he made two remarkable proposals. First, he asked Mrs. Pokora, with whom he was evidently on terms of close friendship, to send him sham registered letters, that is to say, get registered envelopes, put sheets of paper in them and send them to him, purporting to send him a couple of hundred pounds. Another more remarkable thing was that he actually asked that the husband of this lady should come down and should go with him to see a solicitor at Llandilo and impersonate Sykut. Could he have done that, would he have dared to do that, if he had thought there was the smallest chance of Sykut appearing again, although he said in his evidence in court that he did expect him to come back again, this man who had new clothes and other property and left everything behind, if this story is true? According to the appellant, Sykut went off with these people, whether he was going to Poland or anywhere else, leaving his clothes, and never came back or made any attempt to get back. Indeed, the appellant said that he knew one of the men, Jablonski, which I dare say is as good as any other name if you are using a Polish name, and he said that Mr. Jablonski arranged to meet Sykut at Paddington Station at three o'clock, on which day does not matter, and the appellant's account was that he went there and waited till three o'clock and nobody came. Later, he said he met them at a Polish Club and there this document was signed, and the signature said by the prosecution to be a forgery was affixed in the presence of Mr.

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Jablonski and some other man at the Polish Club. Nobody was called from the Polish Club to say that these people ever existed at all.

I do not propose to go all through the evidence that was called, but there was a very remarkable piece of evidence which cannot possibly be accounted for in any other way except that the appellant was deliberately trying to manufacture evidence with regard to the life of Sykut, and that was the local blacksmith's evidence. On December 14, the last day on which anyone saw Sykut alive, a horse from the farm had been taken by the appellant to the blacksmith for shoeing, and the horse had been fetched away from the forge by Sykut, and the blacksmith had charged 17s. 6d. for shoeing the horse. The blacksmith's evidence was perfectly clear about that. He said there was no doubt in his mind at all about the fact that it was on the 14th that Sykut came and took away that horse. Later in the month, at the end of December, when the police were beginning to make inquiries, the appellant visited the blacksmith and paid him the money, and then tried to persuade the blacksmith to say that it was on the 17th that Sykut went there to take the horse away. The case for the prosecution was that Sykut was dead by the 17th, having been killed either on or immediately after the 14th. That was the last day anybody had seen that unhappy man alive, and at the end of December, when the police had begun to make inquiries, the appellant was trying to get a man whose evidence upon one point was vital to give untrue evidence of the date on which Sykut fetched the horse. There can be no doubt about it, either the blacksmith's evidence was true or untrue. If it was true, the appellant was trying to get him to say something untrue.

Those are all matters which were pointed out to the jury by the learned judge and on which they had the advantage of hearing counsel on both sides. It is perfectly true that the learned judge did not point out to the jury all the matters, and a judge does very often say to a jury: "It is very remarkable that such a point has not been proved, and if it could be, it ought

to have been proved." The case for the prosecution was: Sykut has disappeared. He has completely gone from the ken of mankind. It is impossible to believe that he is alive now. I suppose it would have been possible for him to have got out of the country and become immured behind what is sometimes called the Iron Curtain; I suppose there is that possibility, but here there are facts which point inevitably, as it is said irresistibly, towards the appellant being the person who knows and who disposed of that man by one means or another. It may be that it would have been desirable to emphasise to the jury that the first thing they must apply their minds to was: Was a murder committed? But, speaking for myself, I think the way in which the learned judge put it in the two passages I have read did sufficiently direct the attention of the jury to the fact that they had to be satisfied of that, and if they were satisfied of the death, and the violent death, of Sykut, they need not go any further. It is no doubt true that the prosecution relied considerably upon certain minute spots of blood which were found in the kitchen when it was scientifically examined, spots so small that they might easily have escaped the attention of somebody who was trying to wash or wipe up blood. But, at any rate, the appellant did not deny that the blood which was found, although it was a minute quantity, on the wall of the kitchen, and I think in some minute quantity on the ceiling of the kitchen, was the blood of his partner. He said that it was due to the fact that his partner had cut his hand in the field with one of the tractors, and on coming in must have shaken his hand and shaken off some blood. That, of course, was a possibility and it was put to the jury. It was also a possibility that Sykut was disposed of in the kitchen, but there is no evidence that he was and, as has been very properly stressed by Mr. Elwyn Jones, there is no evidence here how Sykut met his death. But this court is of opinion that there was evidence upon which the jury could infer that he was dead, and, if he was dead, the circumstances of the case point to the fact that his death was not a natural death.

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Then, if that establishes, as it does, a *corpus delicti*, the evidence was such that the jury were entitled to find that the appellant murdered his partner.

For these reasons, we have been unable to find any misdirection by the learned judge or anything in the summing up which would justify us in saying that the case was not properly presented to the jury. We have come to the conclusion that there was evidence on which the jury were entitled to find that the appellant's partner was murdered and the appellant was the murderer, and accordingly this appeal is dismissed.

Appeal dismissed.

Solicitors: D. S. Glasbrook, Llandilo, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SELLERS

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Indictment—Assault with Intent to Resist Lawful Apprehension—Power to Convict of Common Assault—Offences against the Person Act, 1861 (*24 & 25 Vict. c.* 100), *s.* 38.

On an indictment for assault with intent to resist lawful apprehension contrary to section 38 of the Offences against the Person Act, 1861, it is open to a jury to convict of common assault, inasmuch as, an assault being a necessary ingredient of the major offence, common assault is a lesser offence of the same quality.

Appeal against conviction (on certificate) and application for leave to appeal against sentence.

The appellant was convicted at Nottingham Adjourned Quarter Sessions held at Newark on November 16, 1954, of

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common assault, and was sentenced by the Chairman (T. R. Fitzwalter Butler, Esq.) to 9 months' imprisonment.

The appellant and another man were charged with assaulting a gamekeeper with intent to resist lawful apprehension. The appellant pleaded Not Guilty and the other man Guilty. The two men were found by the gamekeeper poaching for conies in the daytime. By virtue of section 31 of the Game Act, 1831, in order to render arrest lawful, it was necessary for the gamekeeper to ask the person whom he was intending to arrest his christian name, surname and usual place of abode. The gamekeeper, in his evidence, said that he had asked the appellant for his name only. The evidence of the gamekeeper was that, when first he tried to arrest the appellant, the appellant butted him with his head; that the appellant then called out to his companion "Get out the bloody knives" and two knives were produced; and that when the gamekeeper was retreating the appellant kicked him. At the close of the case for the prosecution, a submission was made by defending counsel that there was no case to answer, as the evidence showed that the arrest which the gamekeeper was endeavouring to effect was an unlawful one. The court ruled that the appellant could not be convicted of the offence charged, but, after hearing argument, ruled that it was open to the jury on the indictment to convict of common assault. The Chairman so directed the jury, but told them that, before they convicted of this offence, they must be satisfied that the appellant had used a greater degree of force than that which was necessary merely to effect his escape. After the appellant had been found guilty of common assault, his co-prisoner, by leave of the court, withdrew his plea of Guilty to the original charge, and substituted a plea of Guilty to common assault. He was sentenced to 6 months' imprisonment.

The Chairman gave the appellant a certificate for appeal under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether on an indictment for assault with intent to

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resist lawful apprehension it was open to the jury to convict of common assault.

Peter Bruce, for the appellant.

The argument for the appellant is based on four general propositions, namely:—(1) Prima facie an accused person can only be convicted of the offence charged, but he may be convicted of a lesser offence where proof of part of the charge alleged is itself an offence (HOLLINGBERRY (1825) 4 B. & C. 329 at p. 330). (2) In the class of case before the court, where the arrest is lawful, there can be cases where the accused could be convicted of common assault, but (3) Even if the arrest is lawful and *a fortiori* if it is unlawful, the accused cannot be convicted of a lesser charge (which is not included in indictment), if the assault proved is not the same physical act as that charged as having been committed with a specific intent. (4) The accused cannot be convicted of common assault where the arrest is unlawful, because the assault proved is not a constituent part of the greater charge but is an offence in its own right involving proof of a greater degree of violence.

On the last proposition, if a person was arrested lawfully, any act repelling the party effecting the arrest is an assault. Where, on the other hand, the arrest was unlawful, the person being arrested is entitled to repel the party trying to arrest him and to do what in the case of a lawful arrest would be an assault. In these circumstances it cannot be said that proof of a common assault was an ingredient of the major charge, because it would be necessary for the prosecution to prove a different and in fact a greater degree of violence to establish the lesser offence of common assault.

It is conceded that, even where the assault was unlawful, this cannot justify the use of any degree of force, for example, the stabbing or shooting of the person arresting and that the direction of the Chairman about the use of reasonable force was correct. It is also conceded that on the evidence it would have been open to the jury to convict of a common assault had

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there been a separate count in the indictment to that effect, but clearly it was not possible to convict of any lesser offence merely because on the evidence such lesser offence might have been proved. ST. GEORGE (1840) 9 C. & P. 483 : PHELPS (1841) C. & M. 180 are the authorities relied on in support of propositions (2) and (3). Further, on the evidence there was an ambiguity with regard to the assault in that it fell into three stages as described in the summing-up.

A. Ellis for the Crown was not called on to argue.

THE LORD CHIEF JUSTICE : The appellant appeals by certificate granted by the learned Chairman of Nottinghamshire Quarter Sessions before whom he was convicted of common assault in these circumstances : he was, along with another man, found poaching by a gamekeeper and he was charged with an assault on the gamekeeper with intent to resist arrest. The reason why he was thus charged was because under section 31 of the Game Act, 1831, a gamekeeper is entitled in the daytime to arrest a person he finds in pursuit of conies, as the appellant was, but he must first ask the person for his full christian names, surname and address. The gamekeeper in this case, who gave evidence with commendable frankness, although given every opportunity of saying what he had asked and although he had said in the magistrates' court that he had asked the appellant for his full name and address, before the jury said he had only asked for his name. That is one of those technicalities which might conveniently be abolished, because very often a gamekeeper may know perfectly well where a person lives, though he does not know his name. Still the statute requires that before he arrests he must ask for name and address, and this gamekeeper did not ask as fully as he ought to have done. The Chairman, therefore, quite properly ruled that the appellant could not be convicted of the offence of assault with intent to resist lawful apprehension under section 38 of the Offences against the Person Act, 1861, because the apprehension was not lawful as the appellant's full name and address had not been asked for.

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But, said the learned Chairman to the jury, " You may, if you like, find the prisoner guilty of a common assault if you are of opinion that he used more force than necessary to avoid the unlawful apprehension." That, I think, again is a perfectly unimpeachable statement of the law. If a person is purporting to arrest another without lawful warrant, the person who is being arrested may use force to avoid being arrested, but he must not use more force than necessary. No doubt what the court—and I think the jury also—regarded as the serious part of the case was that the appellant called out " Get out knives," and knives were produced, which itself would be an assault, in addition to a kicking by him of the gamekeeper. At any rate, the jury came to the conclusion that he did use more force than was necessary for repelling the unlawful arrest. But, says Mr. Bruce, " Though I agree that in those circumstances he could have been found guilty of common assault had he been charged with common assault, he cannot on a charge of assault with intent to resist arrest be found guilty of common assault." I think, with all respect to the interesting argument of Mr. Bruce—he was only called in to the case at a late stage because counsel could not come from Nottingham and the court is obliged to him—the argument fails. An assault with intent to resist arrest is simply one form of aggravated assault, that is to say, it is an assault with circumstances of aggravation which allow a heavier sentence to be passed than in the case of a simple assault. But of course it involves an assault. Here the jury have found the appellant guilty of an assault without aggravation and the law has been clearly laid down over a great number of years that, where a man is charged with an offence, he may be found guilty of a lesser offence of the same quality. The offence charged seems, therefore, to be an *a fortiori* offence. It is necessary to prove an assault and necessary to prove intent to resist arrest. The prosecution prove the assault, but fail to prove the intent to resist arrest and that part of the charge, therefore, fails. Therefore, the prisoner can be found guilty of the offence of assault because

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that is an ingredient of the first offence. It simply means that the jury have found him guilty of the act complained of but without the matter of aggravation. Therefore, in my opinion, the Chairman was perfectly right in leaving this case to the jury.

With all respect I do not think the cases cited apply here. ST. GEORGE (1840) 9 C. & P. 483 was a case, curiously enough, in which that eminent lawyer, Parke B. appears to have held that a man could be convicted of an assault, that is to say a misdemeanour, where the charge was so grave that it amounted to a felony. It is perfectly clear that the law does not allow a man indicted for a felony to be convicted of a misdemeanour unless there is a statute which permits it. There is, for example, a statutory provision that a prisoner indicted for the felony of wounding with intent may be found guilty, if the jury see fit, of the misdemeanour of unlawful wounding.

We are clearly of opinion that a verdict of common assault was justified in this case. We cannot measure the amount or weigh the actual evidence; it was a common assault. Proof of an assault was necessary to prove the offence laid in the indictment, but the intent laid in the indictment failed. For these reasons the conviction is upheld.

With regard to the sentence, the appellant is only twenty, but the Court of Quarter Sessions came to the conclusion that there was no other way of dealing with him than by sending him to prison. Considering that he had only just come out from a sentence of nine months' imprisonment for shop-breaking with two other offences taken into consideration, we think that he can consider himself lucky if his sentence is not increased, but we do not interfere with the sentence.

Appeal dismissed

Solicitors: Hibbert & Co. Mansfield, for the Crown.

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE STREATFEILD AND MR. JUSTICE SLADE

1955
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ROBERT ROSSI

Sentence—Corrective Training or Preventive Detention—Report of Prison Commissioners—Date of Birth of Prisoner and not Merely Age to be Stated—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (4).

In the Report of the Prison Commissioners under section 21 (4) of the Criminal Justice Act, 1948, with regard to a prisoner who is eligible for corrective training or preventive detention, the actual date of birth of the prisoner and not merely his age should be stated.

Appeal against sentence.

The appellant pleaded Guilty at Middlesex Sessions on November, 1954, to shopbreaking and larceny and was sentenced by the Deputy Chairman to 3 years' corrective training.

A notice under section 23 of the Criminal Justice Act, 1948, was proved which included convictions on December 20, 1939, and April 3, 1943, and these were admitted by the appellant. Counsel for the prosecution, relying on the Report of the Prison Commissioners, informed the court that the appellant was 31 years of age. Had this been the case, the appellant would have been under 17 at the time of the earlier conviction, and it could not have been relied on as a qualifying conviction. In fact the appellant was 32 years of age.

J. Yahuda, for the appellant.
H. F. Cassel, for the Crown.

CASSELS J: The appellant pleaded Guilty at Middlesex Sessions to shopbreaking and larceny and was sentenced by the Deputy Chairman to three years' corrective training. He now appeals against his sentence. He does not appeal against his

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conviction. He seems to have been the driver of a motor car, which had been used in some shopbreaking of jeweller's premises. When he was arrested a stolen clock and some other articles were found in his pocket.

It was a serious case meriting serious punishment, and indeed it was pointed out to the court that he had on December 20, 1939, at the Clerkenwell Magistrate's Court been convicted of two cases of larceny and sentenced to five and five months' imprisonment concurrent and on April 3, 1943, he had been sentenced at the North London Magistrates' Court to three and three months' imprisonment consecutive for receiving. Those two convictions, if they had been at the proper age, would have qualified him for a sentence of corrective training, which in fact was passed. The evidence which was put before the court was that the appellant was 31. We are now informed that that was due to a mistake made by the learned prosecuting counsel and that in fact he was 32, so that in truth he was really qualified for corrective training, but the evidence which was before the court that he was 31 clearly indicated that he was under 17 when the first of the qualifying convictions took place. Bearing in mind that for twelve years he has kept himself free from trouble, that he has certain responsibilities, that this crime may well have been attributable to a certain amount of drink taken—and to the keeping of bad company—this Court has come to the conclusion in the circumstances of the case that a reduction may be made in the sentence passed.

But there is one other observation the Court desires to make and that is that, where age is of importance for the consideration of the court, in the Prison Commissioners' Reports which are presented to the court the date of the birth of the prisoner should be stated lest any mistake should be made in calculating what his age was at the time when he received the necessary qualifying convictions. If the date of the birth is not stated but merely the prisoner's age, it is very easy for a court to make a mistake in calculating what his age really was at a particular time. Seeing that the Criminal Justice Act, 1948, makes

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provision for so many different types of sentences to be passed, and many of these types of sentence depend upon the actual age of the prisoner at the time, this seems to the Court to be of very great importance. We, therefore, do suggest that in future no report about a prisoner should omit the date of his birth if the prisoner is being put before a court as eligible for a sentence either of corrective training or preventive detention.

In the circumstances of this case, the Court reduces the sentence from three years' corrective training to imprisonment for 18 months.

Sentence reduced.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

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PRACTICE NOTE

ANTECEDENT HISTORY OF ACCUSED AND CONVICTED PERSONS

THE LORD CHIEF JUSTICE: The Judges of the Queen's Bench Division have considered the question as to the information and history of accused and convicted persons that should be given to the court, counsel and solicitors by police officers before and after conviction. They have resolved as follows:—

(1) Details of previous convictions must always be supplied by the police to the defending solicitor, or if no solicitor is instructed to defending counsel, on request. The Judges are of opinion that there is no obligation on a police officer to satisfy himself that the prisoner has authorised a statement of previous convictions to be given, as it is clearly within the ordinary authority of solicitor and counsel to obtain this information. In order that the defence may be properly conducted, the prisoner's advisers must know whether they can safely put the prisoner's character in issue.

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(2) There is no need for police officers to supply a list of previous convictions to the court before conviction, because the prisoner's previous convictions are always set out in the confidential calendar with which the Judge is supplied by the governor of the gaol, whose duty it is to supply it. The police will, of course, give any information to the governor that he may require to enable him to perform his duty.

(3) A proof of evidence should be prepared by a police officer containing a factual statement of the previous convictions, date of birth if known, education and employment, the date of arrest, whether the prisoner has been on bail and, if previously convicted, the date of his last discharge from prison, if known. It may also contain a short and concise statement as to the prisoner's domestic and family circumstances, his general reputation and associates, and, if it is to be said that he associates with bad characters, the officer giving evidence must be able to speak of this from his own knowledge. This proof may be given either with his brief or at the outset of the case to counsel for the prosecution and to no-one else, as, unless the accused is convicted, it has no relevance. It need not be prepared in two parts. If the accused is convicted, it is to be given to the court and to counsel for the defence, but it will be for counsel for the prosecution in the first place to decide how much of this he asks the officer to prove, while it will, of course, be open to the presiding judge to put any questions he may think fit. The statement should not be handed to the court or to defending counsel until the officer is sworn. It may, by leave of the court, be given to the shorthand writer, who may use it to check his note, but he must only transcribe so much as is given in evidence.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS, MR. JUSTICE LYNSKEY MR. JUSTICE BYRNE AND MR. JUSTICE ASHWORTH

ZENON ANTONI MICHALSKI

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Receiving Stolen Goods—Court Charging Two Prisoners Jointly—Amendment—Name of One Prisoner Struck out—Power on Joint Count to Convict One Prisoner of Receiving Whole or Part—Conviction Affirmed despite Irregularity—Larceny Act, 1916 (6 & 7 *Geo.* 5 *c.* 50), *s.* 44 (5).

The appellant was charged, together with one Mazurek, on an indictment containing two counts, the first of which charged both prisoners jointly with breaking and entering and larceny and the second jointly with receiving stolen property. At the close of the case for the prosecution an application was made by defending counsel to quash the second count on the ground that the evidence disclosed receivings by the prisoners severally and, therefore, a count alleging a joint receiving was bad. The judge directed that the count should be amended by striking out the name of the prisoner Mazurek. Both prisoners were acquitted on the first count, and the appellant was convicted on the second count. The judge then directed the jury to return a formal verdict of Not Guilty in the case of Mazurek on the second count.

Held, (*per* The Lord Chief Justice, Cassels, Lynskey and Ashworth JJ.), (i) that by virtue of section 44 (5) of the Larceny Act, 1916, it was open to the jury on the joint count for receiving to convict separately either of the prisoners who had been proved to have separately received the whole or any part of the property, and that the jury should have been so directed.

REARDON & BLOOR (1866) L.R. 1. C.C.R. 31 applied.

(ii) that it was entirely irregular to strike out of an indictment the name of an accused person who had been arraigned and given into the charge of the jury, and that this could not be done under the guise of amendment.

(iii) that as the irregularity was one which had in no way affected or prejudiced the appellant, the conviction should be affirmed.

Appeal against conviction.

The appellant was convicted at Hampshire Quarter Sessions

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on September 21, 1954, of receiving stolen property and was sentenced by the Deputy Chairman (Eustace Roskill Esq. Q.C.) to 18 months' imprisonment.

The appellant was charged with one Mazurek on an indictment containing two counts. The first count charged both prisoners jointly with breaking and entering and larceny, and the second charged both jointly with receiving stolen property. The evidence led by the prosecution proved that the goods were first in the possession of the appellant and subsequently came into the possession of Mazurek. At the close of the case for the prosecution an application was made by defending counsel to quash the second count on the ground that, as the evidence disclosed receivings by the prisoners severally, a count alleging a joint receiving was bad. The Deputy Chairman directed that the count should be amended by striking out the name of Mazurek. Both prisoners were found Not Guilty on the first count and the appellant was found Guilty on the second count. The Deputy Chairman then directed the jury to find a formal verdict of Not Guilty in respect of Mazurek on the second count.

Eric Myers, for the appellant:

The question whether a count in an indictment is amended or a new count added is a question of law. Here the Deputy Chairman purported to amend the second count by striking out the name of Mazurek, so that the count then read, and read *ab initio*, as a count of receiving against the appellant alone. It is submitted, however, that the Deputy Chairman did not in fact amend that count, but framed an entirely new count. The appellant was therefore, in effect, tried and convicted on a new count on which he had never been arraigned and to which he had never pleaded. Assuming, however, that what did take place was an amendment and not the framing of a new count, the second count, in that it charged two separate receivings as a joint receiving, was bad on the ground of duplicity.

On that view, the count was not merely defective, but bad *ab initio*. A defective count can be amended, but one that is bad cannot be cured by amendment.

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Sir Harry Hylton-Foster, Q.C. (*S.-G.*), *Christmas Humphreys* and *Robert Hughes* for the Crown were not called on to argue.

At the conclusion of the argument, the LORD CHIEF JUSTICE said that the appeal would be dismissed, and that the court would give their reasons for the decision during their next sittings.

Cur. adv. vult.

Jan. 31, 1955. The following judgment was read.

THE LORD CHIEF JUSTICE: The judgment I am about to read is the judgment of Cassels, Lynskey, Ashworth JJ. and myself.

The court has already dismissed this appeal and now proceed to give their reasons for the decision.

The appellant was charged together with one Mazurek on an indictment containing two counts, the first charging both the defendants with breaking and entering and larceny and the second charging both with receiving stolen property. There was no conviction of either on the first count, but the appellant alone was convicted on the second. It is unnecessary to set out the somewhat lengthy facts in detail; suffice it to say that, while the second count alleged and charged a joint receiving, the evidence led by the prosecution disclosed two several receivings; it was proved that the goods were first in the possession of the appellant and subsequently came into the possession of Mazurek. At the close of the case for the prosecution counsel on behalf of both prisoners applied to quash the indictment. We are not concerned with what was argued with regard to count 1, but apparently the ground upon which it was sought to quash count 2 was that, as the evidence disclosed receivings by the prisoners severally, a count alleging a joint receiving was bad. A short answer to this contention which might have been made was that this state of affairs is expressly dealt with by section 44 (5) of the Larceny Act, 1916, which provides that if at the trial of any two or more persons indicted for jointly

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receiving any property it is proved that one or more of such persons separately received any part of such property, the jury may convict upon such indictment such of the said persons as are proved to have received any part of such property. The provisions of this section first appeared in the law as long ago as 1851; it formed section 14 of the Administration of Criminal Justice Act, 1851 (14 & 15 Vict. c. 100), an Act passed, as appears from its stately and sonorous preamble, to prevent offenders from escaping conviction by reason of technical strictness in matters not material to the merits. It was subsequently held in REARDON & BLOOR (1866) L.R. 1 C.C.R. 31 that the section applied where two persons separately received the whole of the property, as the whole includes a part, so it follows in our opinion that this sub-section afforded a complete answer to the objection.

Unfortunately this provision was not called to the attention of the court and the learned Deputy Chairman attempted to get out of the apparent difficulty by striking the name of Mazurek out of the count, and so leaving it against the appellant only. The court cannot agree that this was a right procedure. Mazurek was in charge of the jury and could only be delivered by verdict. It is true that the learned Deputy Chairman sought to put this right by directing the jury when they returned a verdict acquitting Mazurek on count 1 to return a verdict of Not Guilty against him on the second count, but by that time his name had been struck out. To strike an accused person's name out of an indictment after arraignment and putting him in charge of the jury is entirely irregular and cannot be done under the guise of amending. Mazurek, of course, makes no complaint and is not an appellant and, as we shall show, the present appellant cannot take advantage of what did not affect or in any way prejudice him.

Mr. Myers, however, contended before this court that the count was bad, mainly, we think, on the ground of duplicity. This we do not understand. Only one offence is charged in the count. Duplicity arises where more than one charge is contained

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in a single count. It is true that the offence charged was a joint receiving and the evidence proved two separate receivings, but apart from the provisions of the section to which we have referred above this does not make the count bad. A count is not bad because the evidence does not support it, though it may result in a verdict of Not Guilty. Section 44 (5) enables a jury to convict on a joint charge of receiving though it turns out that there have been separate receivings, but, apart from the subsection altogether, it is obvious that a jury has always had the power to convict one prisoner and acquit the other. One of the accused may satisfy the jury that he never had possession of the goods or that he had no knowledge that they were stolen. This may often occur where the accused are master and servant. The presiding judge might in a proper case direct a verdict of Not Guilty against one prisoner at the close of the case for the prosecution or the jury might stop the case against one; the case would then proceed against the other prisoner or prisoners and there would be no ground for saying that the count was bad. The learned Deputy Chairman felt that the case of PEARL & ARNOLD (1942) 28 C.A.R. 183 created a difficulty and obliged him to hold that the count was bad unless amended. In that case again the subsection was not brought to the attention of the court. All the court said there was that separate receivings ought to be put in separate counts —and so they ought if it is clear to the draftsman of the indictment that the depositions disclose separate receivings. But the court in that case did not hold that, if a joint receiving was charged and it turned out on the evidence at the trial that there were separate receivings, the indictment was bad. Were we to hold this, it would entirely put an end to the subsection. Although the amendment or purported amendment striking out the name of one prisoner was irregular, it was one which in no way affected or prejudiced the appellant, so there is no ground for interfering with the conviction.

Appeal dismissed.

Solicitors: Oswald, Harrison & Smith, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE GORMAN

GLADYS MARY CARVER

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Sentence—Permitting Premises to be Used as Brothel—Six Months' Imprisonment and Fine with Imprisonment in Default—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 13 (2) (*b*), *as amended by Criminal Law Amendment Act*, 1922 (12 & 13 *Geo.* 5, *c.* 56), *s.* 3—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 14 (1) (*c*).

By section 13 of the Criminal Law Amendment Act, 1885, as amended by section 3 of the Criminal Law Amendment Act, 1922: "Any person who . . . (2) being the tenant, lessee or occupier or person in charge of any premises knowingly permits such premises or any part thereof to be used as a brothel . . . shall . . . be liable . . . (*b*) on a second or subsequent conviction, to a fine not exceeding £250 or to imprisonment . . . for a term not exceeding 6 months; or . . . to both fine and imprisonment."

The appellant was convicted at quarter sessions of an offence under the above section, after having been previously convicted of such an offence, and was sentenced to 6 months' imprisonment and a fine of £200, or in default a further term of 6 months' imprisonment.

Held, that, in view of the provisions of section 14 (1) (*c*) of the Criminal Justice Act, 1948, empowering courts of quarter sessions to impose a sentence of imprisonment in default of payment of a fine, the sentence imposed was a lawful one.

Appeal against sentence.

The appellant was convicted at the County of London Sessions on January 7, 1955, of permitting premises to be used as a brothel, after a previous conviction of such an offence, contrary to section 13 (2) (*b*) of the Criminal Law Amendment Act, 1885 (as amended) and was sentenced by the Chairman to six months' imprisonment and a fine of £200, or a further six months' imprisonment in default.

Peter Bruce for the appellant.

Michael Corkrey for the Crown.

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THE LORD CHIEF JUSTICE: The appellant was convicted of permitting premises to be used as a brothel after a previous conviction for that offence and the court imposed the maximum sentence of imprisonment, six months, and ordered her to pay a fine. The statute under which she was convicted (section 13 (2) (*b*) of the Criminal Law Amendment Act, 1885, as amended by section 3 of the Criminal Law Amendment Act, 1922) authorises the court to impose imprisonment for six months and a fine not exceeding £250. The court imposed imprisonment for six months and, as they looked upon it as a very bad case, also imposed a fine of £200. The court ordered that, in default of payment, she should serve a further six months, making twelve months in all.

Mr. Bruce has contended that that sentence is not authorised by law because Parliament has provided a maximum sentence of six months and, therefore, no further sentence of imprisonment could be imposed. What the statute has provided is that the sentence that can be imposed is six months' imprisonment plus a fine. Obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay.

One looks to see what are the powers of the court under the Criminal Justice Act, 1948, which made very considerable changes in the law in regard to the recovery of fines. In BROOK, 33 Cr.App.R. 92; [1949] 2 K.B. 138, by which we are bound, this court said that an entirely new procedure was introduced by the Criminal Justice Act, 1948, with regard to the payment of fines, and that although the Levy of Fines Act, 1822, and the Queen's Remembrancer Act, 1859, were not repealed, so that certain matters of machinery still had to be carried out, as for instance, entry of the fine on the estreat roll and the return to the sheriff and so forth, we have now to consider simply the provisions of section 14 of the Act of 1948. That section provides: "Subject to the provisions of this section, where a fine is imposed by, or a recognisance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this

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section. . . ." That seems to me to apply to any fine. Fines have always been enforced before courts of summary jurisdiction by means of a sentence of imprisonment being imposed in default of payment or in default of distress. There is a short code of the length of imprisonment that can be imposed according to the size of the fine. The maximum sentence that can be imposed by a court of summary jurisdiction is three months for non-payment of a fine, but it has always been the policy of the legislature, certainly before magistrates' courts, to deal with the question of non-payment of fines by a sentence of imprisonment. By the Criminal Justice Act, 1948, a considerable change was introduced into the law. Among other things, courts before whom prisoners were convicted on indictment were given powers to impose fines for felony; they had always power to impose a fine for misdemeanours. Section 14 (1) provides: " where a fine is imposed." It does not limit the provision to cases where a fine is imposed, but no sentence of imprisonment is imposed. The subsection reads: " where a fine is imposed by . . . a court of assize or quarter sessions, an order may be made . . . (*c*) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered. . . ."

In these circumstances we think that quarter sessions were entitled to make the order which they did. It may be that the sheriff can still distrain on the goods. If the sheriff distrains on the goods while the appellant is serving her sentence and recovers the sum of £200 by distraint, when her sentence of six months is finished, there will be an end of it; but if distraint does not produce the £200 or the fine has not been paid, she will have to serve a further six months. In these circumstances the appeal is dismissed.

Appeal dismissed.

Solicitors: Alfred Bieber & Bieber, for the appellant; Town Clerk, Paddington Borough Council, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GORMAN

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HOWARD STANLEY LOVE

Obscene Libel—Charge against Director of Company—Company Printers of Libel—Defendant Absent when Order for Printing Given—Direction to Jury.

The appellant was the sole effective director of a company which printed books which were obscene libels. He was absent at the time when the order for printing was given and had no knowledge of the contents of the books. He said in his evidence that he accepted full responsibility, and the judge directed the jury that the appellant almost inevitably took responsibility for what was done.

Held, that, there being no evidence that the appellant knew the contents of the books, the direction was wrong and the conviction must be quashed.

ALLISON (1888) 54 L.T. 933 applied.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on September 24, 1954, of conspiring to publish and of publishing obscene libels and was sentenced by the Recorder of London to a fine of £250.

The appellant was the sole effective director of Maxwell, Love & Co., Ltd., a printing company. The company printed two books which were found to be obscene libels. At the time when the order for printing was given the appellant was absent ill and had no knowledge of the contents of the books. When seen by a police officer, he said "I take full responsibility" and adopted the same attitude when giving evidence. The Recorder of London directed the jury: "In his evidence [the appellant] really has disposed of the whole question, because, being the sole director of the company, he is the company; he almost inevitably takes responsibility for what was done."

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Montague Waters, for the appellant:

It is conceded that the general rule is that a company is liable for the acts of its servants committed on its behalf and in the scope of their duty, but the position of the liability of a director for acts done in his absence, of which he had no knowledge and where no knowledge can be imputed to him, is different. ALLISON (1888) 54 L.T. 933, is an authority for the proposition that in such circumstances a director is not liable. That was the position in this case, and the direction of the Recorder was not in accordance with that decision, though it is fair to say that his attention was not called to it.

E. J. P. Cussen, for the Crown:

It must be admitted that the direction of the Recorder was not in accordance with ALLISON (*supra*) and that in some cases a direction on the lines of that decision would be proper. The position, however, in the present case was different, because the appellant had specifically said that, though absent when the order to print the books was given, he took full responsibility for what was done.

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Recorder of London on two counts, the first of which charged him with conspiring to publish obscene libels in the form of obscene books, and the second with publishing obscene libels.

The point that is taken on his behalf is this. He was a director of a company which printed the books which the jury have found were obscene libels. It seems to have been agreed that he was absent when the order to print was given, but he does not seem to have been absent when it was completed and the books were sent out. When seen by the police, he admitted that the company of which he was the sole effective director and manager had printed the books and said that he took full responsibility. When he was in the witness-box, in answer to the question " In fact, did you have anything to do personally

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with the printing by your company of these two books?" he said "No, sir, nothing at all, but I will not shelter behind that. I did not consider them obscene." It looks very much as if he was saying: "I did not see the books, but if I had seen them I should have published them just the same." Now, when he has been convicted, he takes, and is entitled to take, the point that he ought not to have been convicted. He relies on ALLISON (1888) 59 L.T. 933, a decision of the Court for Crown Cases Reserved, by the decisions of which this court has always considered itself bound. That case was not cited to the learned Recorder, but, had it been, I am sure he would have summed up in a manner different from the manner in which he did. In that case, which also involved the conviction of directors of a company which had printed a libel, the court quashed the convictions on the ground that there was no evidence that the directors knew the contents of the review containing the libel; they had not delivered a single copy of it, and that went to knowledge. The court emphasised the fact that the printers were the company and that there was no evidence that the directors knew the contents.

In view of the evidence given by the appellant and the attitude which he had taken up, saying that he took full responsibility, it is not surprising that the Recorder told the jury: "In his evidence he really has disposed of the whole question, because, being the sole director of the company, he is the company. He almost inevitably takes responsibility for what was done. That is what he has said. He takes full responsibility. That, I think, answers the question." Had ALLISON'S CASE (*supra*) been cited to the learned Recorder, we are quite sure he would have summed up differently and left certain questions to the jury. Had the jury answered those question in a certain way, the court might then have had to decide if there was any evidence on which they could have so answered. In view of ALLISON'S CASE (*supra*), we are of opinion that the direction which the Recorder gave to the jury

cannot be upheld. That is enough to dispose of this appeal, and we quash the conviction.

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Conviction quashed.

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Solicitors : H. W. & S. Patey, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GORMAN

LESLIE HOPE

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Sentence—Preventive Detention or Corrective Training—Notice of Previous Convictions—Proof of Service of Notice—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 23 (1).

By section 23 (1) of the Criminal Justice Act, 1948, "for the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section, no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury."

Proof of the service of the notice under the above subsection is a matter on which the court has to be satisfied and does not require the verdict of a jury.

The prisoner disputed the receipt of a notice which purported to bear his signature, and the judge, having looked at the signature on a letter written to him by the prisoner applying for legal aid, came to the conclusion that the signature on the notice was the prisoner's.

Held, that the service of the notice had been properly proved.

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Appeal against sentence.

The appellant pleaded Guilty at the City of Gloucester Quarter Sessions on December 7, 1954, to burglary and larceny and was sentenced by the Recorder (Raglan Somerset, Esq.) to ten years' preventive detention.

The prosecution put in evidence a document purporting to be a notice of previous convictions and sentences under section 23 of the Criminal Justice Act, 1948, which bore the appellant's signature and purported to admit that he had been served with it. The appellant denied that the signature was his and disputed service. The Recorder, having compared the signature with the signature on a letter admittedly written to him by the appellant asking for legal aid, was satisfied that the disputed signature was the appellant's and that the notice was valid.

Henry Palmer, for the appellant:

DICKSON, 34 Cr.App.R. 9; [1950] 1 K.B. 394, is authority for the proposition that service of the notice of intention to prove previous convictions under section 23 of the Criminal Justice Act, 1948, must be strictly proved. In the present case, the learned Recorder, having compared the disputed signature on the form of acknowledgment of receipt of the notice with the appellant's signature on his application for legal aid, told the appellant that there was a prima facie case that the disputed signature was in fact his. That could not be proof of the service of the notice, because there was no evidence before the court that it was the appellant's signature on the application for legal aid. The trial judge should either disregard matters arising after conviction which are challenged by the defence or should order proper proof to be given: CAMPBELL (1911) 6 Cr.App.R. 131.

R. V. Cusack, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellant appeals against a sentence of ten years' preventive detention passed upon him by the learned Recorder of Gloucester and the learned single

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judge gave leave to appeal in order that the court might consider whether or not the conditions precedent to that sentence had been fulfilled. In effect, it is an appeal on law only and the learned judge refused leave to be present, but when I saw the papers in the case, I thought it was desirable that the appellant should be present, because, if we had felt obliged to give effect to the point of law, we should have had to alter the sentence.

The point taken is this: that section 23 (1) of the Criminal Justice Act, 1948, which deals with the proving of the convictions necessary to qualify a prisoner for preventive detention provides: "no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury." I pause there to say that, as the section requires notice to be given, the court must be satisfied that notice has been given. As the section says that the question whether the prisoner has been previously convicted is to be determined by the verdict of a jury, it follows that it is distinguishing between that part of the requirements and the other part, which is merely the service of the notice. So far as the service of the notice is concerned, the court can be satisfied and the section does not require that a verdict of a jury should be taken on that matter. It is realised by those responsible for the working of this Act, the Home Office and the police, that there may be occasions when it is difficult to prove the service of the notice if, for instance, the officer is dead or ill or at a great distance away or out of the country at the time; therefore, when the notice is served on the prisoner, he is always invited to sign a receipt, saying, in effect: "I have been served in pursuance of section 23 of the Criminal Justice Act with notice of the convictions and sentences specified below" and they are set out. By signing that document the prisoner is not necessarily admitting the convictions, although there is a form at the bottom: "I do

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admit or I do not admit the said convictions and sentences." The main object is to invite the prisoner to admit the service of the notice. He is always entitled to say he does not admit the convictions, if he so wishes.

In this case, the notice had been served on the court. There is a strong presumption, at any rate, that it had been served on the appellant, though I am not saying that that is a presumption of which the court could take notice without some evidence. The appellant denied that he had ever been served with the notice and a duplicate was produced. The learned Recorder had a letter from the appellant asking for legal aid. There is no doubt that that was his letter, as he admitted it; and the learned Recorder, having looked at the letter asking for legal aid and at the copy of the document admitting service of the notice, said he was satisfied that the appellant had signed this notice. Indeed, it looks as if the appellant finally admitted he had signed the document I have in my hand, which purports to bear his signature. At any rate, the court is quite clearly of opinion that there was evidence before the Recorder that the signature which was produced admitting the service was the appellant's signature; therefore, there is no difficulty with regard to his qualifying for preventive detention, if it was a proper sentence. The appellant has not got leave to appeal against the length of sentence if the court is satisfied that the preliminaries were fulfilled, but we will just say that he is thirty-one years of age and he has nine previous convictions, all for housebreaking and larceny. The present convictions were for burglary, which is always a more serious offence. In 1950 he was sentenced to six years' imprisonment for shopbreaking and four other offences were taken into consideration and the present offences were committed within two months of his coming out of prison. This is just one of the cases for which Parliament has provided preventive detention and this appeal is dismissed.

Appeal dismissed.

CIRCUIT CASE (WELSH CIRCUIT)

BEFORE

MR. JUSTICE BARRY

R. *v.* CHARLSON

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Inflicting Grievous Bodily Harm—Defence that Act was done Unconsciously—Matters to be Proved by Prosecution—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 20.

On a charge of unlawfully inflicting grievous bodily harm, contrary to section 20 of the Offences against the Person Act, 1861, although no specific intent need be proved by the prosecution, the prosecution must none the less prove that, when the prisoner did the act which caused the injury, he was acting consciously and knew what he was doing and realised that he had no lawful justification for the act. If the jury should think that the prisoner was or might well have been at the material time acting as an automaton without any real knowledge of what he was doing, his condition being similar to that of a person in an epileptic fit, the verdict should be Not Guilty.

Trial before Barry J. at Cheshire Assizes.

The prisoner, Stanley Charlson, was charged on an indictment containing three counts, the first of which charged him with causing grievous bodily harm to his son with intent to murder him, contrary to section 11 of the Offences against the Person Act, 1861; the second with causing grievous bodily harm to the son with intent to do him grievous bodily harm, contrary to section 18 of the Act, and the third with unlawfully and maliciously inflicting grievous bodily harm on the son, contrary to section 20 of the Act.

The son, who was ten years old, was invited by the prisoner to look out of a window at a rat in the river below, and when he did so, was struck on the head with a mallet by the prisoner and thrown out of the window by him and injured. The boy had done nothing which could have annoyed the prisoner and did not suggest that the prisoner showed any signs of annoyance before he attacked him. There was no evidence

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suggesting any provocation or any motive for the attack. The evidence of the prisoner's wife was that he had always been a very devoted husband and father and that he had always been almost too lenient with the boy. There was nothing strange about the prisoner's actions or words before the attack. The prisoner stated that he remembered hitting the boy, but did not know why he had hit him, and that the next thing he remembered was being in his car.

There was a history of ill-health, particularly cerebral afflictions, in the prisoner's family and the prison doctor said that clinical examination and the history of the case showed that there was at least the possibility of the prisoner suffering from a cerebral tumour, and that a person suffering from a cerebral tumour was liable to an outburst of impulsive and motiveless violence over which he had no control at all.

H. E. Hooson, for the Crown.

D. E. P. Evans Q.C. and *P. L. W. Owen*, for the prisoner.

BARRY J. summed up as follows: On any view, you may think this is a very pathetic case. You have heard from the police officers, from other witnesses and from the prisoner's own wife what type of a man the prisoner is. It is not disputed by the prosecution that he has been a very devoted husband and father throughout his married life, and there is nothing to suggest that he and the little boy had any serious differences at all. Indeed, there is everything to suggest the contrary. You may think that he was a very devoted and indulgent father, and that he and his little son got on very well. These are matters for you. It is such a man who faces these very serious charges.

The charges are three in number. The first and most serious one is that of causing grievous bodily harm to the little boy with intent to murder him. The second and alternative charge, which is somewhat less serious than the first, is that of causing him grievous bodily harm with the intention of causing him some grievous bodily harm. The third and

least serious of the three charges is that of inflicting grievous bodily harm on the boy without any specific allegation as to his intention.

No plea of insanity is raised in this case. If the facts warrant it, it is always open to an accused person to say: "I am guilty of the offence with which I am charged, but at the time when I committed it I was insane, and therefore I should not be punished for what I did." That is a defence which has to be raised by the prisoner, and in this case it has not been raised. Indeed, you have heard from the medical officer at Manchester Prison that the prisoner is sane and is not suffering from a disease of the mind. That, however, does not conclude the matter. The prosecution have to prove the case against him. What have the prosecution to prove with regard to each of the three charges? With regard to all of them they have to prove that the prisoner caused some grievous bodily harm to his son. There has been no dispute about the facts. The defence accept the story, which was told to you by the little boy, about what happened on the evening of January 13, 1955. You may have no doubt that the prisoner did in fact cause grievous bodily harm to the boy and you need not trouble about that aspect of the case when considering any of the three charges. However, the prosecution must prove more than that. In relation to the first two charges it is necessary for the prosecution to prove the intention alleged in the indictment; that is to say, in relation to the first charge, the prosecution must satisfy you not only that the prisoner did cause grievous bodily harm to his son, but also that, at the time when he did it, he intended to murder the boy. Nothing short of that will suffice. Both the act of causing grievous bodily harm and the intention to murder must be established to your complete satisfaction. The onus rests on the prosecution, and the prosecution must satisfy you, as regards each offence, of all the elements of that offence. It is not for the prisoner to prove his innocence. If you are in any doubt about the matter, he is entitled to be acquitted. Similar considerations

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apply to the second charge, which is that of causing grievous bodily harm with the intention of causing grievous bodily harm. There again, the prosecution has to prove, not only that the prisoner did inflict these injuries on his son, about which there is no real question, but also that, when he inflicted the injuries, he intended to do some serious injury to the boy. Unless you are satisfied that that intention was present in the prisoner's mind at the time when he committed those acts, then the second alternative charge is not established. Lastly, there is the third charge of inflicting grievous bodily harm. In relation to that charge the prosecution need not prove a definite intent. They do have to prove, however, that the grievous bodily harm was caused by the prisoner unlawfully and maliciously. This means that there must be a conscious act on the part of the prisoner. Malice does not necessarily involve the existence of some hostility to the person injured. It does, however, mean that the act must be done consciously. In order to commit an unlawful and malicious act, the prisoner must know what he is doing and must realise that he has no lawful justification for the act.

These are charges of criminal offences and the first two charges are of the utmost gravity. In order to commit them, the prisoner must have had a guilty mind. For example, an act which otherwise might be an assault would not be assault if it were done purely accidentally. In a public street one might suddenly put one's hands up to stop one's hat being blown off, and might hit a passer-by on the nose without one's knowing he was there. If you and I had consciously put up our hands, whatever the motive, and hit the passer-by on the nose, it would have been an assault, for it would have been a conscious act. If it is purely accidental, no assault is committed, for the element of consciousness is not present. Similarly, in the case of certain diseases, a person suffering from disease may be deprived of the control of his actions. A man in the throes of an epileptic fit does not know what he is doing. If a friend bends over to assist him, and in the midst of the fit the epileptic grips his friend by the throat,

not knowing what he is doing, and in so doing throttles the friend and causes his death, no offence against the criminal law has been committed, because the actions of an epileptic are automatic and unconscious, and his will or consciousness is not applied to what he is doing. He is not in conscious control of his actions. [After referring to the evidence, his Lordship continued:] You must consider the whole of the evidence and apply your minds to each of these charges in turn. When you consider the first count, you must ask yourselves whether there is anything in this case which could possibly justify you in reaching the view that the prisoner really intended to murder his son, remembering that the intention to murder must be brought home to the prisoner with certainty. You must all be certain that the prisoner intended to murder the boy, and unless you are so satisfied, the first charge has not been proved and you should return a verdict of Not Guilty on it. If you think that it has been proved, then it would be your duty to return a verdict of Guilty. If you think that it has not been proved, you will proceed to the second and alternative charge and consider that with equal care.

Again, you will look at the whole picture. You will consider the sort of man that the prisoner was and all the events leading up to the very tragic incidents which resulted in the serious injuries to the boy. A man, in a state of nervous tension, may suddenly lose his temper with a child who has been irritating and annoying and do some injury to it, but here there is no suggestion that anything the little boy did could have annoyed his father. He was invited by his father to go and look at a rat which his father had seen below the window which was just above the river, and he did so. He did nothing which could have annoyed any parent, and he does not suggest that his father showed any signs of annoyance with him before he struck him. You have to ask yourselves in those circumstances whether you ought to infer that the prisoner did have a real intention of causing serious injury to his son.

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The intention of the prisoner can, of course, only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say, with positive certainty, what his intention was at any particular time. A jury is entitled to infer a man's intention from his acts. As you were rightly told by learned counsel for the prosecution when this case was opened, in normal circumstances a man is presumed to intend the normal and usual consequences of his acts. If a man consciously and deliberately strikes another person with a mallet of this kind, in ordinary circumstances any jury would feel entitled to say that it must have been intended to do some serious injury. You cannot hit a person on the head with a mallet, or strike him in the chest with a knife, without the extreme probability that serious injury will occur, and, therefore, other circumstances being equal, a jury is perfectly entitled to infer the intention from the mere act itself. However, that is not an inference which must always be drawn, and before it can be drawn you should look at all the surrounding circumstances and ask yourselves whether that inference should be drawn in this particular case. It is open to you to think that, although an ordinary person in ordinary circumstances must inevitably have intended to do injury by using a mallet of this kind on the head of a little boy, none the less you are not satisfied that this particular man had that intention, owing to the state of his health as we now know it, and having regard to his relationship with this boy, and also owing to the lack of any provocation on the part of the boy or any motive of any kind for crime. It is for you to look at the whole of the circumstances and, having done so, to make up your minds whether it has been established to your satisfaction that the prisoner, when he inflicted those injuries, intended to do grievous bodily harm to his son. If you are not satisfied that that intention was there, then there must be a verdict of Not Guilty on the second also of these alternative charges, and you would have to consider the third.

No specific intention need be proved by the prosecution

before the prisoner can be found guilty of the third charge of inflicting grievous bodily harm. You must, however, be satisfied that he was acting consciously, and that he knew what he was doing when he inflicted those blows. If he did, however much his mind was disturbed, and whatever mitigating circumstances there may have been, he would be guilty of this offence. If he knew that he was striking his son, and if he realised that he had no legal excuse for striking him, as clearly he had not, and if he did that act consciously and of his own volition, then he would be guilty of inflicting grievous bodily harm. Therefore, in considering this third charge, you have to ask yourselves: Was the prisoner knowingly striking his son, or was he acting as an automaton without any control or knowledge of the act which he was committing? If you think that he was in a condition similar to that of a person in an epileptic fit, who does not know what he is doing at all, then the elements of malice and unlawfulness would not have been established. If you are left in doubt about the matter, and you think he might well have been acting as an automaton without any real knowledge of what he was doing, then the proper verdict, even on the third and least of these charges, would be Not Guilty.

[His Lordship then further reviewed the evidence, and continued:] Looking at the whole of these matters, are you satisfied that the prisoner intended to murder the boy when he caused those injuries to him? If you are so satisfied beyond any real doubt, then the verdict would be Guilty on the first count. A verdict of Guilty on the first count means that the remainder of the counts need not be further considered. On the other hand, if you are not satisfied that he intended to kill his son, you have to consider the second and alternative charge. There the question is whether you are satisfied beyond any real doubt that, when the prisoner inflicted those injuries, he intended to inflict serious physical injury on his son. If you are so satisfied, the verdict is Guilty; if you do not think that intention is proved, then the proper verdict is Not Guilty. If you find the prisoner Guilty on the

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second charge, you have no need to proceed to the third count. If you find him Not Guilty on the first two charges, the third charge of inflicting grievous bodily harm must receive consideration. On the third charge you have not to consider these questions of intention. There the question is whether the prisoner knew what he was doing when he struck the blows. If he struck his son with the mallet, knowing what he was doing, and by those blows caused injuries, then he is guilty of the third charge. If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit and no responsibility rests on him at all, then the proper verdict is Not Guilty. Will you be good enough now to retire, and let me know in due course whether you find the prisoner Guilty or Not Guilty on each of the three offences with which he is charged.

Verdict: Not Guilty on the whole indictment.

Solicitors: The Clerk to Cheshire County Council, for the Crown; Davis, Hope & Furniss, Glossop, for the prisoner.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GORMAN

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Sentence—Supervision Order—Previous Sentences of Imprisonment—Imprisonment for Non-payment of Fine—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 22 (1) (*a*), *s.* 80.

Imprisonment served in default of payment of a fine to which the offender has been sentenced does not rank as a sentence of imprisonment within the meaning of section 22 (1) (*a*) of the Criminal Justice Act, 1948, so as to enable a supervision order to be based on it.

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Appeal against sentence.

The appellant was convicted at the West London Magistrates Court of three offences of larceny and one of obtaining goods by false pretences. He was committed for sentence under section 29 of the Magistrates' Courts Act, 1952, to the County of London Sessions for sentence, and on October 10, 1954, he was sentenced to three years' imprisonment. The court also made a supervision order under section 22 of the Criminal Justice Act, 1948, rendering the appellant subject to section 29 of the Prison Act, 1952.

Before the supervision order was made, two previous convictions were proved against the appellant, one for obtaining credit by fraud, for which he was sentenced to twelve months' imprisonment, and one for certain Customs offences, in respect of which he was fined and ordered to serve a sentence of imprisonment in default of payment. The appellant, being unable to pay the fine, served the sentence of imprisonment.

S. A. Morton, for the appellant:

A sentence of imprisonment in default of payment of fine served by a prisoner does not rank as a sentence of "imprisonment" within the meaning of section 22 (1) (*a*) of the Criminal Justice Act, 1948. "Impose imprisonment" is defined in section 80, the definition section, and so also is "sentence." The latter does not include "a committal in default of payment of any sum of money." "Payment of any sum of money" does not merely refer to orders made by magistrates in the exercise of their civil jurisdiction, such as maintenance orders, but includes also payment of a fine.

[He referred to the Criminal Justice Administration Act, s. 1 (now replaced by section 69 of the Magistrates' Courts Act, 1952) and section 41.]

John Phipps, for the Crown, conceded that the submission made on behalf of the appellant was correct.

THE LORD CHIEF JUSTICE: The appellant was sentenced at the County of London Sessions to three years' imprisonment

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and made subject to section 29 of the Prison Act, 1952. He applied for leave to appeal against his sentence, being only interested in seeing if he could get the sentence of imprisonment reduced. That application was refused, but on the application the Registrar called the attention of the court to the fact that an order had been made under section 29, and it was suggested to the court that it was not clear whether a sentence of imprisonment for the non-payment of a fine was imprisonment within the meaning of the Criminal Justice Act, 1948, for the purpose of enabling the court to make the order under section 22 of the Act, which makes him subject to section 29 of the Prison Act, 1952. The court had not the advantage of any argument, when the matter was previously before a court consisting of myself, Cassels and Sellers JJ. Our attention was not directed to certain definitions which are in section 80 of the Act. Thinking it might be a matter of some importance, the court did give a short judgment in which we said that a sentence of imprisonment for non-payment of a fine was a sentence of imprisonment within section 22.

Section 22 provides: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . . the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months," report to an approved society.

At the London Sessions two previous convictions were proved against the appellant. One was for the offence of obtaining credit by fraud, for which he was sentenced to twelve months' imprisonment, and on that no question arises. The other was a conviction in respect of certain Customs offences for which he was ordered to pay a fine and imprisonment in default, and he was imprisoned in default. The question is whether imprisonment in default of payment of a

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fine is a sentence of imprisonment within the meaning of section 22 (1) (*a*). To decide that, we have to look at the definition in section 80 (1), which provides: "'Impose imprisonment' means pass a sentence of imprisonment or commit to prison in default of payment of any sum of money or for failing to do or abstain from doing anything required to be done or left undone." If that section applied, there would be no doubt, but the words "impose imprisonment" do not appear in section 22. They appear only in sections 17, 18 and 19, to which I need not for this purpose refer. Lower down in the definition section, section 80 (1), is the definition of the word "sentence": "'Sentence' includes an order for detention in a detention centre, an order for custody in a remand home under section 54 of the Children and Young Persons Act, 1933, and an order sending an offender to an approved school, but does not include a committal in default of payment of any sum of money."

It is arguable that the words "payment of any sum of money" refer only to the power of justices to make maintenance orders and various other orders by means of which a magistrates' court can, in the exercise of what I may call civil jurisdiction, order a person before the court to pay and commit him to prison if he does not pay. Parents are sometimes ordered to pay sums of money for the maintenance of their children if they are sent to approved schools. The most common committal order made in a magistrates' court is an order in respect of maintenance which has not been paid. But on full consideration, especially a consideration of the sections in the Criminal Justice Administration Act, 1914, to which Mr. Morton has called attention, we think that the view we took on the former occasion was wrong, and "payment of any sum of money" does include payment of a fine.

Section 1 of the Criminal Justice Administration Act, 1914 (replaced by section 69 of the Magistrates' Courts Act, 1952), starts by dealing with the effect of non-payment of fines, and it was that Act which for the first time introduced into what I may call magistrates' law or, indeed, the whole criminal law,

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the obligation to give a person time to pay a fine unless there were special circumstances why they should not. Section 1 (1) of that Act provides: "A warrant committing a person to prison in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued forthwith unless the court which passed the sentence is satisfied . . ." of certain matters. It is there that we find the expression "in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction," a fine is a sum which is adjudged to be paid by a court of summary jurisdiction or any other court. It is true that, when one comes to section 41 of that Act, it is provided: "For the purposes of this Act, unless the context otherwise requires—(1) The expression 'sentenced to imprisonment' shall include cases where imprisonment is imposed by a court on any other person either with or without the option of a fine, or in respect of the non-payment of any sum of money. . . ." That definition is distinguishing, no doubt, between a committal for non-payment of a fine and committal for non-payment of any sum of money, but the definition of "sentenced to imprisonment" is quite different from the definitions in section 80 (1) of the Criminal Justice Act, 1948, of "sentence" or "impose imprisonment."

The Director of Public Prosecutions has appeared in this case, and he submits to the court that the argument which counsel for the appellant has put forward is right. Accordingly, we decide that, where there has been a committal in default of payment of a fine, that is not a conviction which can be taken into account under section 22 (1) (*a*) of the Criminal Justice Act, 1948, for the purpose of imposing an order under that section. We need not deal with any matter connected with preventive detention. The decision we give in this appeal is confined to the making of an order under section 22 (1), and it does not affect convictions under section 21 (1), which deals with corrective training. To this extent, the appeal is allowed, and the order under section 22 (1) will be set aside.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GORMAN

JAMES GORDON KEITH MITCHELL

1955
Feb. 21

Obtaining Credit by Fraud—Necessity of Debt being Incurred—Allowance of Sum of Money to Thief of Stolen Motor-cycle on Hire-Purchase of Another—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1).

The appellant obtained a motor-cycle under a hire-purchase agreement and sold it before completing payment on the instalments. He represented to the firm to which he sold it that it was his own property and induced them to let him have another motor-cycle on hire-purchase and credit him with £65, which was the second-hand value of the first motor-cycle. He pleaded Guilty to larceny of the first motor-cycle and to obtaining credit to the amount of £65 by means of fraud other than false pretences, contrary to section 13 (1) of the Debtors Act, 1869.

Held, that the plea to obtaining credit should not have been accepted, as, in order to constitute that offence, a debt must be incurred, and there was no creation of a debt in the present case.

Appeal against sentence.

The appellant pleaded Guilty at Dudley Quarter Sessions on December 9, 1954, to larceny of a motor-cycle and to obtaining £65 by means of fraud other than false pretences, contrary to section 13 (1) of the Debtors Act, 1869, and was sentenced by the Recorder (Gilbert Griffiths, Esq.) to three years' corrective training (concurrent).

The facts, which are summarised in the headnote, appear fully in the judgment.

No counsel appeared.

THE LORD CHIEF JUSTICE [after stating that there was, in the opinion of the court, no ground for interfering with the

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conviction or sentence on the first count]: In our opinion, counsel should not have advised his client to plead Guilty to the second count nor should the learned Recorder have agreed to accept that plea. The matter was mentioned to him and he said that he thought it was a proper course. The circumstances are these. The offence charged in the first count was the old story of a man obtaining a motor-vehicle on hire-purchase and selling it while it was subject to hire-purchase. That is stealing, because it was not his property to sell, the property remaining in the person from whom he hired it till he completed the payments. In the second count, he was charged with obtaining credit by fraud from the firm to which he sold it. But he did not obtain credit; to obtain credit, there must be a debt. What he did was to sell the motor-cycle, representing that it was his own, and induced the firm to let him have another motor-cycle on hire-purchase and credit him with £65, the second-hand value of the motor-cycle he was selling. That is not obtaining credit. He did not obtain credit for any sum. He entered into a hire-purchase agreement, and the firm accepted a motor-cycle which they believed to be his, but which turned out not to be his. We need not speculate on the question what offence that amounted to, but it certainly did not amount to obtaining credit by fraud or under false pretences. The appellant did not obtain credit. The expression which is used in such cases is that a person is "credited" with a sum and that is taken as if he had paid; but to obtain credit under the Debtors Act, there must be the creation of a debt, and there was no creation of a debt here. Therefore, the conviction on the second count will be quashed.

Conviction on one count affirmed.
Conviction on another count quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GORMAN

HAROLD PERCY BLANDFORD
GEORGE NIGHTINGALE FREESTONE

1955
Feb. 28;
Mar. 7

Venue—Receiving Stolen Goods—Goods Stolen in County where Trial Held but Received Elsewhere—Summons—Issue by Magistrate Outside County—Discretion—Similar Cases Pending in County—Nexus between All Cases—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 11 (1)—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 1 (2) (*b*).

The appellants were committed for trial on charges of receiving stolen goods by examining justices for the county of Montgomery to Montgomeryshire Quarter Sessions and were there convicted. The goods had been stolen in that county, but the receiving by the first appellant had taken place in the county borough of Southampton and the receiving by the second appellant in the county of Stafford. Other persons resident in the county of Montgomery were being there proceeded against for receiving property stolen from the same owner and some of the witnesses for the prosecution were common to all the cases including the cases of the appellants. In view of those facts, a justice for the county of Montgomery had issued a summons under section 1 (2) (*b*) of the Magistrates' Courts Act, 1952, requiring the appellants, who resided outside the county, to appear before a magistrates' court in the county.

Held, that the nexus between all the cases constituted material on which the justice could properly exercise his discretion under the subsection to issue a summons outside the county; that the summons was, therefore, lawfully issued; that, under section 11 (1) of the Criminal Justice Act, 1925, the committal for trial was valid, and that the convictions should, therefore, be affirmed.

A justice issuing a summons under section 1 (2) (*b*) of the Act of 1952 should bear in mind that not only the interests of the prosecution, but also the interests of the defence, are at stake.

Appeals against conviction and sentence.

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The appellants were convicted at Montgomeryshire Quarter Sessions on January 6, 1955, of receiving stolen property, and were sentenced by the Chairman, Freestone to five years' imprisonment and Blandford to eighteen months' imprisonment.

The goods in question were stolen from a factory at Newtown, Montgomeryshire, and on September 23, 1954, the thieves were convicted at Montgomeryshire Quarter Sessions. On October 20, 1954, a justice for Montgomeryshire issued a summons requiring the appellants to appear before a magistrates' court for the petty sessional division of Newtown Upper in the county of Montgomery. Neither of the appellants was resident in Montgomeryshire, and the acts of receiving by them had taken place in the county borough of Southampton and in the county of Stafford respectively. The justice who issued the summons was informed that other persons resident in Montgomeryshire were summoned to appear at the same court charged with receiving in Montgomeryshire similar property stolen from the same prosecutors and that all of the witnesses for the prosecution would be the same in both cases. The appellants appeared before the magistrates' court sitting as examining justices. No objection was made to the jurisdiction of the court and under section 9 (2) of the Magistrates' Court Act, 1952, they were committed for trial to Montgomeryshire Quarter Sessions, where they were separately indicted and convicted.

On February 28, 1955, the court (the Lord Chief Justice, Ormerod J. and Gorman J.) reduced the sentences, in the case of the appellant Freestone to one of three years' imprisonment and in the case of the appellant Blandford to one of nine months' imprisonment.

P. L. W. Owen, for the first appellant.
H. G. Talbot, for the second appellant.
H. E. Hooson, for the Crown.

THE LORD CHIEF JUSTICE: These two appellants were separately indicted and convicted before the Quarter Sessions

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for the county of Montgomery for receiving stolen goods. Freestone was sentenced to five years' imprisonment and Blandford to eighteen months' and both appealed against sentence. On the case coming before the court it did not appear from such information as we had how the Quarter Sessions of Montgomery had jurisdiction to deal with the offences as, though the property was stolen in that county, the goods the subject of the charge against Freestone were received by him in the county of Stafford and the receipt by Blandford was in the county borough of Southampton. We accordingly directed that the appeal should be treated as an appeal against conviction as well as against sentence and directed that the prosecution should be represented in order that we might hear on what grounds it was suggested there was jurisdiction in the Quarter Sessions.

Before 1925 the venue in the case of receiving was governed by section 39 (3) of the Larceny Act, 1916, and that subsection enabled a receiver to be indicted, tried and punished only in that part of the United Kingdom where he received the property in the same manner as if it had been originally stolen or taken in that part. The law relating to venue in indictable offences was altered and extended by section 11 (1) of the Criminal Justice Act, 1925, which provided that "a person charged with any indictable offence may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence. . . ." These two appellants appeared before the justices sitting as examining justices on a summons issued on October 20, 1954, the thieves concerned having been convicted at the Quarter Sessions on September 23. It seems, therefore, that we have to consider whether the summons on which they appeared was lawfully issued.

On the hearing of the appeal, counsel for the prosecution informed the court that the reason why these appellants were summoned to Montgomeryshire was because other persons

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resident in that county were summoned to appear at the same court, being charged with receiving in Montgomeryshire similar property stolen from the same prosecutors, and he contended that the provisions of the Magistrates' Courts Act, 1952, authorised in these circumstances proceedings being taken in that county. Counsel for both appellants agreed that the facts were as stated by counsel for the prosecution and, as both of them had full knowledge of the facts, having represented the appellants below, we did not think it necessary to call for formal evidence on the point.

We have now, therefore, to consider the provisions of the Magistrates' Courts Act, 1952, which, as the long title shows, is a consolidation Act relating to the jurisdiction of, and the practice and procedure before, magistrates' courts. The Act, in effect, deals with the practice and procedure both where magistrates are sitting as a court of summary jurisdiction and where they are sitting as examining magistrates. By section 1 (2) (*b*) it is provided that a justice may issue a summons or warrant "if it appears to him necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being or is to be proceeded against, within the county or borough. . . ." By section 2 (3): "A magistrates' court . . . shall have jurisdiction as examining justices over any offence committed by a person who appears or is brought before the court, whether or not the offence was committed within the county or borough." In our opinion the words "who appears" refer to a person appearing on a summons and the words "is brought before the court" refer to a person brought before the court in custody as the result of an arrest with or without a warrant. So far as this case is concerned, we are dealing with a summons, and in our opinion the words "who appears" must mean "appears on a summons lawfully issued." If the person has appeared on a summons lawfully issued, then section 9 directs the magistrates, if they commit for trial, to commit him to quarter sessions or assizes, as the

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case may be, for the place where he is to be tried. By subsection (2): "If a magistrates' court proposes to commit a person for trial before a court of assize or quarter sessions that has jurisdiction to deal with the offence by virtue only of subsection (1) of section 11 of the Criminal Justice Act, 1925," provisions are made enabling them in case of hardship to commit to another court of trial, and for appeal to the High Court if the accused considers that the magistrates' decision would cause him hardship. As the magistrates did commit under this section to the Montgomeryshire Quarter Sessions, we are thrown back again to section 11 (1) of the Act of 1925 and must consider whether the summons was lawfully issued.

It is quite clear that but for the fact that two other people were being summoned or being brought up in custody at the same time and place the magistrates would not, in our opinion, have had jurisdiction to issue a summons returnable before them for offences committed in Staffordshire and Southampton, but the facts of which we have now been apprised appear to bring the case within section 1 (2) (*b*) of the Act of 1952. That section operates although the persons are not to be tried jointly. It is enough if some other person is charged with an offence and that must mean an offence connected with the offence in which the summons has been issued against the other defendant. The justice has to consider whether or not it is necessary or expedient with a view to the better administration of justice that the defendants should be summoned to what may be called a foreign jurisdiction. The fact that persons resident within that jurisdiction are being charged with offences so similar or closely connected that the witnesses for the prosecution or some of them will be the same in both cases may, we think, be a good reason for the justice exercising the discretion vested in him by the section. Further, it is a matter which can properly be considered that, where there are offences which are so similar or closely connected, uniformity in treatment of the accused persons may be desirable. The High Court could interfere by means of prohibition

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or certiorari only if there was no ground on which the justice could exercise his discretion, and had there been no such ground no doubt this court could have quashed the conviction because of the lack of jurisdiction. We cannot limit the words " an offence " so that in this case it would be confined to the theft of the goods, but, as we have already said, there must be some nexus between the offence charged against the other person and that in respect of which the summons under consideration was issued.

We desire, however, to emphasise that a justice acting under this subsection should bear in mind that it is not only the interests of the prosecution that are at stake but also the interests of the defendants. While it may be very convenient and economical from the point of view of the prosecution that they should be able to proceed in a particular county, it must be remembered that to bring a man, as in this case, from Hampshire to North Wales is a very serious matter. It would necessarily cause him considerable expense and might put very great difficulties in the way of the preparation and presentment of his defence and the calling of witnesses. We are not saying that any injustice or any undue hardship was caused in this case and, as the section empowered the justice to issue the summons and we find it impossible to say there were not grounds upon which he could exercise his discretion, it follows that the defendants could be lawfully committed to the Montgomeryshire Quarter Sessions, and accordingly this appeal fails. We have already reduced the sentence passed in the case of Freestone to three years' imprisonment and of Blandford to nine months.

Appeals against conviction dismissed.
Sentences reduced.

Solicitors : Churchill, Clapham & Co., agents for Richard George & Jenkins, Newtown, for first appellant; Kingsford, Dorman & Co., agents for Argyle & Sons, Tamworth, for second appellant; Milwyn Jenkins & Jenkins, Newtown, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PEARCE

IVOR CLYDE ROWE

1955
Apr. 19

Death of Appellant—Sentence of Imprisonment—Refusal to Allow Widow to Continue Appeal.

Where a prisoner who has been sentenced to imprisonment has given notice of appeal, but he died before the hearing of the application for leave to appeal or of the appeal, the court will not allow his widow or executor or any other person to continue the appeal; but, in the case of the sentence or a fine, the court might allow an executor or administrator, as a person having a pecuniary interest, to continue the appeal, or to commence an appeal where no notice of appeal had been given by the person convicted.

HODGSON *v.* LAKEMAN [1943] K.B. 15, applied.

Application for leave to appeal against conviction.

The original applicant was convicted at Bedfordshire Quarter Sessions on February 15, 1955, of obtaining property by false pretences and was sentenced by the Deputy-Chairman (Cyril Harvey, Esq., Q.C.) to eighteen months' imprisonment. On February 21, 1955, the applicant gave notice of appeal against conviction, but died in prison on the night of March 8–9, 1955, before his application for leave to appeal could be heard. The applicant's widow, who was desirous of continuing the proceedings, instructed counsel to appear on her behalf.

Peter Lewis, for the widow of the applicant:

The prisoner was a man of unblemished character and his widow desires to proceed with the appeal to clear his name. Quite apart from reasons of sentiment, the conviction may affect her in her employment and general reputation. There is no authority in this court with regard to what should happen in such circumstances, but in HODGSON *v.* LAKEMAN

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[1943] K.B. 15 the Divisional Court allowed an appeal to be prosecuted by the executors of an appellant who had died before the appeal could be heard. [He referred also to ROBERTS (1732) 2 Str. 937 and GAINSWORTH *v.* PINE (1870) 35 J.P. 21, and unreported cases referred to in Short & Mellor's *Crown Office Practice* (2nd ed.) (1908) p. 425.] [THE LORD CHIEF JUSTICE: Where relatives desire to clear the name of a deceased person who has been convicted, the proper course may be to apply for a free pardon.]

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: Ivor Clyde Rowe was convicted at Bedfordshire Quarter Sessions of a charge of false pretences and was sentenced to eighteen months' imprisonment. He was convicted on February 15, 1955. He gave notice of appeal within time on February 21 and he has since died in prison.

Mr. Peter Lewis, instructed not by the prisoner, but by the prisoner's widow, applies to be allowed to continue the application, but in the opinion of the court a widow or an executor or an administrator of a deceased person cannot be allowed to appeal to this court unless such person can show a legal interest. If a person is sentenced to pay a fine and dies having appealed, or even dies after sentence before appealing, it may be the court would allow executors or administrators to appeal on the ground that, if they can get the conviction quashed, they can recover the fine for the benefit of the estate of the deceased which they are bound to administer. In the case to which our attention was called, HODGSON *v.* LAKEMAN [1943] K.B. 15, which was a case not in this court but in the Divisional Court, though the principle would be the same, the court allowed the executors to continue the appeal after the death of the appellant because there was a pecuniary interest. Supposing, as sometimes happens, a man is convicted on indictment and fined £500, the Crown can recover that money whether he is alive or dead, and can recover it against his estate if he is dead and, therefore, it would be an injustice if the executors were not

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allowed to appeal in order to say that the conviction was wrong, because, if it was wrong, the money would be saved.

It may be it is artificial to say that, if there is a pecuniary penalty, an appeal might lie, whereas, if imprisonment is imposed, there cannot be an appeal, but I do not see any ground on which we can say here that anybody has an interest. It may be that the widow would be very glad to have her husband's name cleared, but we cannot take any notice of that sentimental interest. There is nobody affected now by the judgment of the court, because the judgment of the court was a sentence of imprisonment and the prisoner has died. If the sentence of the court had been a fine, then somebody would be affected by it and would have an interest in getting it set aside. Nobody has an interest in getting this conviction and sentence set aside because the sentence was on the prisoner and he is dead and it would be a very novel step if we said that the court would entertain an appeal.

For these reasons the application for leave to appeal must be refused.

Application refused

Solicitors: Giffen & Couch, St. Albans, for the widow of the applicant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE BYRNE

JOHN WILLIAM BRYANT

1955
May 9.

Offence by Soldier—Stealing Property of Regimental Institute—Charge of "Committing a Civil Offence, that is to say, Larceny, contrary to section 2 of the Larceny Act, 1916"—Section under which Proceedings should be Taken—Army Act, ss. 18, 41—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 2.

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By section 2 of the Larceny Act, 1916: "Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with [imprisonment] for any term not exceeding five years . . ."

By section 18 of the Army Act: "Every person subject to military law who commits any of the following offences, that is to say . . . (4) steals . . . any property belonging to a person subject to military law, or belonging to any regimental band . . . or mess or . . . institution, or to the Navy, Army and Air Force Institutes, or any public property . . . shall, on conviction by court-martial, be liable to suffer imprisonment for a term not exceeding two years."

A person subject to military law who commits an offence falling within section 18 of the Army Act, *e.g.*, stealing Government stores should be charged under section 18 and not under the common law as applied by section 41 of the Act. If the prosecution do prefer a charge of larceny under the common law as so applied, they should omit any words relating to section 2 of the Larceny Act, 1916, which does not create an offence, and charge the offence simply as larceny.

A sergeant was convicted on a charge under section 41 of the Army Act of "committing a civil offence, that is to say, larceny, contrary to section 2 of the Larceny Act, 1916, in that he . . . stole two Egyptian pounds, the property of the President of the Regimental Institute . . ." and was sentenced to be reduced to the ranks.

Held, that the words "contrary to section 2 of the Larceny Act, 1916," should be treated as surplusage and that the conviction should be affirmed.

Appeal against conviction.

The appellant, Sergeant John William Bryant, of the Royal Army Service Corps, was convicted by a court-martial in the Canal Zone on January 28, 1955, on a charge laid under section 41 of the Army Act of "committing a civil offence, that is to say, larceny, contrary to section 2 of the Larceny Act, 1916, in that he at Port Said on December 22, 1954, stole two Egyptian pounds, the property of the President of the Regimental Institute of No. 1 Cold Storage Depot, Royal Army Service Corps," and was sentenced to be reduced to the ranks. The Judge Advocate advised the court that, though the appellant might

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have been charged under section 18 of the Army Act, he was liable to be charged under section 41.

W. Percy Grieve, for the appellant:

The point of the appeal is that the charge under section 41 was inappropriate, for section 18 does provide a penalty of two years' imprisonment on conviction by court-martial. The appellant should not, therefore, have been charged under the Larceny Act, 1916, as applied by section 41 of the Army Act, but under section 18 of the Army Act. The definition of "stealing" under the Army Act is contained in section 190 (as amended), and that definition cannot create any difficulty. The point before the court is devoid of authority, except for the general rules dealing with interpretation of statutes. It is plain from the wording of section 2 of the Larceny Act that, having regard to section 18 (4) of the Army Act, a person subject to military law cannot be convicted of an offence under section 2 of the Larceny Act where he is charged with stealing (a) from a comrade; (b) from a Service Institution; (c) public property. This is the view expressed by the editors of the *Manual of Military Law*, p. 146, and it is adopted for the purpose of this argument. The reasoning of the Judge Advocate in rejecting the submission of the defending officer was fallacious. By the ordinary rules of interpretation of statutes *generalia specialibus non derogant*. The procedure laid down by section 41 of the Army Act for charging a soldier with a civil offence does not, therefore, revoke the express provision of section 2 of the Larceny Act. Moreover, it was the clear intention of the legislature to provide by the procedure afforded by section 18 (4) of the Army Act an appropriate penalty for stealing within the Service. Should it be argued on behalf of the Crown that, if the interpretation I contend for is right, larceny of the kind envisaged by section 18 (4) of the Army Act is not cognisable by a civil court, I say that that is not so, because section 18 (4) expressly provides a penalty on conviction by court-martial, and proviso (*a*) to section 41 makes it clear that the jurisdiction of a civil court is not affected.

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[THE LORD CHIEF JUSTICE: But surely the words " contrary to section 2 of the Larceny Act, 1916," in the present charge were surplusage? Larceny is a common law offence.]

Not all the forms of larceny which come within the Larceny Act, 1916, were larceny at common law, *e.g.*, larceny by a bailee. Section 1 of the Larceny Act, 1916, extends beyond larceny at common law.

E. Garth Moore, for the Crown:

The Army Act provides a separate code dealing with a particular class of persons. There is, therefore, no " special punishment provided under . . . any other Act " for the offence within the meaning of section 2 of the Larceny Act, 1916, and the reference to that statute was appropriate, and the charge properly laid under section 41 of the Army Act. The appellant could not have been dealt with by court-martial in England under section 18 (4) of the Army Act.

W. Percy Grieve replied.

THE LORD CHIEF JUSTICE: The appellant was charged and convicted before a court-martial sitting in the Canal Zone of an offence which was stated in the charge sheet as " committing a civil offence, that is to say, larceny, contrary to section 2 of the Larceny Act, 1916, in that he at Port Said on December 22, 1954, stole two Egyptian pounds, the property of the President of the Regimental Institute of No. 1 Cold Storage Depot, Royal Army Service Corps." He does not dispute the justice of his conviction in the sense that he has not alleged on the merits that he was not guilty of theft. The point he took was that he ought to have been charged under section 18 of the Army Act and not under section 41. The learned Judge Advocate advised the court that, although he might have been charged under section 18, he was none the less liable to be charged under section 41 and accordingly they convicted him and sentenced him to be reduced to the ranks, he being a sergeant.

This court desires to say that it entirely agrees that the

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appellant ought to have been charged under section 18 and it is highly desirable that the prosecuting authorities, before they start a prosecution, should make up their minds on the appropriate section of the Army Act under which the offender should be tried and charge him under that section; but in the particular matter with which we are dealing, as I hope to show in a moment, it does not make any difference to the conviction whether he was charged under section 41 of the Army Act with committing a civil offence punishable under the law of England or under section 18, which specifically deals with stealing the property of a regimental institute and so forth. What is said here is that he ought to have been charged under section 18 and he cannot be charged under section 2 of the Larceny Act because section 2 of the Larceny Act provides: "Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with [imprisonment] for any term not exceeding five years . . ."

The first thing to observe is that section 2 of the Larceny Act does not create an offence. Larceny was always an offence at common law. The common law recognised a very limited number of offences—I think about six—and larceny was always one. Gradually, as society got more complicated, offences such as embezzlement, larceny by a bailee, and many others had to be created. To take the offence of larceny by a bailee, it had to be made a statutory offence, as the bailee's original possession was lawful, and therefore he could not at common law be charged with stealing. In just the same way, embezzlement was made a felony only quite late, I think, in the reign of George III, because the clerk who received the money was receiving it lawfully. The crime he committed was putting it in his pocket and using it after he received it, and that had to be made a statutory offence.

Section 2 of the Larceny Act is, in fact, a section which deals with punishment only, that is to say, if a man is guilty of larceny and there is no other punishment provided by the Larceny Act or any other Act, he is liable to five years'

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imprisonment for such a larceny. It is worth remembering, in my opinion, that the words "contrary to section 2 of the Larceny Act, 1916," are surplusage. If a man is charged with simple larceny, he is charged with a common law offence and not an offence against a particular statute. Byrne J. has reminded me of Rule 4 (3) of the Rules in the First Schedule to the Indictments Act, 1915, which provides: "The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence." Simple larceny is not an offence created by statute; it is an offence at common law. Therefore the charge sheet might have left out the words "contrary to section 2" and simply said "committing a civil offence," that is to say, larceny. Let us see what is the position when a soldier commits larceny. Section 41 of the Army Act provides: "Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows; that is to say." Then, leaving out the first offences: treason, manslaughter, rape and so on, it is provided in subsection (5): "If he is convicted of any offence not before in this section particularly specified"—and larceny is one not particularly specified—"which when committed in England is punishable by the law of England, be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England."

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A soldier who is charged with and convicted of larceny is, therefore, liable to serve such punishment as is assigned for such offence by the law of England. For the punishment for simple larceny one turns to section 2 of the Larceny Act and finds that if there is no other section of the Larceny Act or any other Act which imposes any particular sentence, the offender is liable to five years' imprisonment. But turning then to section 18 of the Army Act because he is a soldier, one finds that it is provided: " Every person subject to military law who commits any of the following offences, that is to say . . . (4) steals, embezzles or fraudulently misapplies or receives, knowing it to have been stolen or embezzled, any property belonging to a person subject to military law, or belonging to any regimental band . . . or mess or . . . institution, or to the Navy, Army and Air Force Institutes, or any public property . . . shall, on conviction by court-martial, be liable to suffer imprisonment for a term not exceeding two years." That section limits the penalty to two years, but it does not affect the offence; it affects the penalty. It limits the penalty to two years because where a soldier is convicted by court-martial of simple larceny, there is a special section which provides that two years is the maximum sentence. There is no question here of any length of sentence because the appellant was not sentenced to imprisonment at all. Section 18 provides that he shall " be liable to suffer imprisonment for a term not exceeding two years, or such less punishment as is in this Act mentioned," and the " such less punishment " imposed was reduction to the ranks.

Accordingly, the appeal is dismissed, but the court would emphasise the desirability of the prosecution making up their minds what is the offence to be charged and the facts relating to the offence before they put forward the charge; and if it is an offence which falls within section 18, as does the stealing of Government stores by a soldier, then he should be charged under section 18 and not under the common law. If the prosecution do prefer a charge under the common law, they should leave out any words relating to section 2 of the Larceny Act

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and charge the offender, as it is proper to charge him in this country, simply with the common law offence of larceny.

Appeal dismissed.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE GORMAN AND MR. JUSTICE HAVERS

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HERBERT KITSON

Road Traffic—Driving under Influence of Drink—"Driving"—Car Found by Defendant in Motion—Seizing of Steering Wheel and Attempt to Control Car by Defendant—Car Steered on to Grass Verge—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 15.

The appellant was seen by the police in a motor-car, which followed an erratic course for about 300 yards down a hill and was then steered by the appellant on to a grass verge. The appellant's case was that the car had been driven on the day in question by his brother-in-law, that he himself had fallen asleep, and, on awakening, found that the car was moving of its own volition; that he immediately grabbed the steering wheel and tried to control the car; and that he did not put on the handbrake because of the greasy condition of the road. At the time the appellant was under the influence of drink to such an extent as to be incapable of having proper control of the car. He was convicted of driving the car when under the influence of drink, contrary to section 15 of the Road Traffic Act, 1930.

Held, that on the facts of the case the appellant was "driving" the car within the meaning of that section, and that the conviction must be affirmed.

Appeal against conviction.

The appellant was convicted at Leeds Quarter Sessions on April 18, 1955, of driving a motor-car when under the influence of drink and was sentenced by the Recorder (G. R. Hinchcliffe,

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Esq., Q.C.) to four months' imprisonment and ordered to be disqualified for holding a licence for three years.

The car was seen by the police with the appellant alone in it following an erratic course for about 300 yards down a hill. It was then steered by the appellant on to a grass verge. The appellant's brother-in-law came running up and the appellant asked him to note that he had steered the car on to the verge. The appellant was at the time under the influence of drink to such an extent as to be incapable of having proper control of the car. The appellant, in evidence, said that he had not been feeling well and had fallen asleep; that when he awoke the car, which had been driven by his brother-in-law before he fell asleep, was moving of its own volition and there was no one in the driving seat; that the ignition key was not in the hole and the handbrake was off; that when he found that the car was moving he immediately grabbed the steering wheel and tried to control the car; and that he did not put the handbrake on because of the greasy condition of the road.

C. G. L. Du Cann, for the appellant:

The appellant was not in law driving the car at the material time. There must be some line drawn with regard to what constitutes "driving"; for example, a person who jumped on a runaway vehicle and tried to stop it would not be "driving" it for the purposes of the Road Traffic Acts. He would be doing a highly commendable action, and would not involve himself in criminal liability in respect of his attempt to control the vehicle. A number of cases recently have dealt with what amounts to "driving." The first was WALLACE *v.* MAJOR [1946] K.B. 472, a case of a person steering a towed vehicle. It is conceded that the facts of that case are entirely different from those of the present case. SAYCELL *v.* BOOL [1948] W.N. 232; [1948] 2 All E.R. 83, where the person in the car was held to be driving, is distinguishable from the present case, because in that case the vehicle was set in motion by the defendant. [He referred also to SHIMMELL *v.* FISHER AND OTHERS, 36 Cr.App.R. 100; [1951] W.N. 484, and FLOYD *v.* BUSH [1953] 1 W.L.R. 342; [1953]

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1 All E.R. 265.] Where a vehicle has been started by motion independent of the person found in charge of it, such person cannot be said to be " driving."

Alastair Sharp, for the Crown, was not called on to argue.

GORMAN J.: The appellant was convicted at Leeds Quarter Sessions of an offence under section 15 of the Road Traffic Act, 1930. The part of the section (subsection (1)) which refers to this charge is: " Any person who when driving or attempting to drive, or when in charge of, a motor-vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle " is guilty of an offence.

The case was tried before the learned Recorder of the City of Leeds and a jury, and the appellant was found guilty. The appeal which has been argued before us by Mr. Du Cann raises one point: was the appellant in law driving the car at the time of which complaint is made? There was abundant evidence here that his state, due to drink, was such that he was incapable of having proper control of the car and the only issue which has been argued before this court is that there was not any evidence upon which he could have been found guilty of driving the car. Mr. Du Cann has complained of one or two passages in the summing-up to the jury by the learned Recorder, but he says: " In substance here my case is, and I stand or fall by this, that there was no evidence upon which the appellant could have been found guilty of driving the car."

In support of the legal contentions which he put forward he relied on a number of cases. The first was WALLACE *v.* MAJOR [1946] K.B. 472, and in particular a passage in the judgment of the Lord Chief Justice (Lord Goddard) at p. 476. That was a case where the facts were essentially different from the facts of the present case. That was the case of a disabled motor-vehicle which was being towed by another motor-vehicle and the person who, it was alleged, was driving was in fact sitting at the steering wheel for the purposes of steering. The Lord Chief Justice said, at p. 476: " The question that we have to

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decide is whether or not [the justices] were right in holding that the man was not the driver on the admitted facts of the case. The facts in the case are that a motor-vehicle was proceeding along the road towing another vehicle, and the respondent was the man who was steering the towed vehicle. The towed vehicle at that time had broken down, or was incapable of being driven, by reason of some mechanical defect." On the facts of that case it was held that the justices came to a right decision, and that they were right in saying that, in the circumstances of that case, the respondent was not driving the vehicle.

The next case to which attention was called was SAYCELL *v.* BOOL [1948] W.N. 232; [1948] 2 All E.R. 83. The headnote in the All England Reports is: "On December 10, 1947, the respondent, who was then disqualified for holding a licence to drive a motor-vehicle, released the brake of a lorry which he owned and which was standing at the head of an incline and steered it down the road into his garage, a distance of about 100 yards. The engine was not started, and there was no petrol in the tank." It was found that he was guilty of driving a motor-vehicle, and at p. 84 the Lord Chief Justice (Lord Goddard) said: "The question raised in this case is whether the respondent was driving the lorry at the time in question. The lorry, which he owned, was standing at the head of an incline. There was no petrol in the tank, and the respondent, having released the brake, set the lorry in motion by pushing it, got into the driving seat, and let the lorry go down the hill so as to get it into his garage. I dare say he thought he was not committing an offence, but it seems impossible to say that in those circumstances he was not 'driving' the vehicle. He controlled it by operating the brakes and the steering wheel, and one cannot say that he was not the 'driver' for the purposes of the Road Traffic Act."

Mr. Du Cann says that, although in that case the person charged was in fact held to be the driver, the case is distinguishable from the present case by reason of the fact that in that case the vehicle was set in motion by the person charged; but

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it is important to remember that he set the lorry in motion before he got into the driving seat and, there then being a vehicle in motion, he operated the brakes and the steering wheel and took it down the road.

There were two other cases: SHIMMELL *v.* FISHER AND OTHERS, 36 Cr.App.R. 100; [1951] W.N. 484, and FLOYD *v.* BUSH [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265. Mr. Du Cann called attention to the words of Lord Goddard at p. 266 of the latter case in the All England Reports: "If he is driving the car, that is to say, causing the car to be moved without the consent of the owner, he is committing an offence." The words upon which Mr. Du Cann relies are these: "If he is driving the car, that is to say, causing the car to be moved," then he is guilty of an offence. Mr. Du Cann says that the test which was there applied was that the driver of a car must be a man who was causing the car to be moved and if the car is being moved by motion independent of the man in charge of the car, then he is not in fact driving it. SHIMMELL *v.* FISHER AND OTHERS (*supra*) was a case of taking and driving away, and that, too, is in the mind of the court.

The facts of this case are somewhat unusual. Apparently, this car had been driven for some time by the appellant's brother-in-law. The appellant said that he was not feeling very well. At any rate, his brother-in-law took the key of the car. In giving his own account of the incident, the appellant said this in evidence: "Q. At some stage on that journey did your brother-in-law stop the car? A. Yes. Q. Do you remember that? A. What I remember is suddenly-like awakening from this doze, and the car was moving. Q. Did that surprise you because the car was moving? A. There was no one in the driving seat. Q. Where was the car when you woke up and saw that there was no one in the driving seat? A. The effect on me when I saw the car moving was more or less—I did not take particular notice of actually where it was at that time, but I have found out since it was about half-way down Wellington Hill—moving on its own volition. Q. Was the engine on? A. No, sir. Q. Was the ignition key in the hole? A. No, sir.

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Q. Did you notice whether there was anything untoward about the brake? A. The hand brake was off." To diverge for a moment from his evidence, the evidence of the police was that they followed this car which was taking a most erratic course at least 300 yards down the road, that the car was then stopped on a grass verge at the bottom of the hill, and after they had got there and seen the appellant and formed an opinion as to his condition, someone, who was presumably the brother-in-law, came running up, and to him the appellant said: "Please note I have driven on to the grass verge." To return to another answer given by the appellant, he was asked: "What was your reaction? A. I immediately grabbed the steering wheel with my right hand and tried to steer it in a proper manner. I realised that if I had put on the hand brake, with the greasy surface of the road, there would possibly be a skid and with the car not having an engine brake on the transmission it is dangerous to apply the brakes, and I thought the best thing was to get from the passenger seat into the driving seat where I would be more or less able to control it in a normal manner, and I think I managed to do that."

Having regard to the facts of this case and having regard to the evidence given by the appellant, it is quite impossible to say that on the evidence of the appellant himself he was not in fact driving this car. The car was subject to his control. It was subject to his direction and he steered it in some way so as to bring it on to the grass verge at the bottom of the hill. It is quite impossible to say in this case there was not evidence upon which the jury could find, as in fact they did find, that at the time of this occurrence the appellant was driving the car. No question arises with regard to the condition of the appellant at that time and in the view of the court this conviction was right and the appeal against conviction must be dismissed.

Appeal dismissed.

Solicitors: Sidney Torrance & Co., agents for Jack Levi, Leeds, for the appellant; The Town Clerk, Leeds, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE STREATFEILD, MR. JUSTICE DEVLIN, MR. JUSTICE GORMAN AND MR. JUSTICE HAVERS

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DENNIS PATRICK MURTAGH
KENNETH KENNEDY

Summing-Up—Burden of Proof—Charge of Murder—Defence of Accident—Jury not Specifically Directed to Acquit if Explanation of Defendants Left Them in Doubt.

Convictions of murder and manslaughter quashed in a case where the defence had been that of accident on the ground of defect in the summing-up, the jury not having been specifically directed to acquit if the explanation of the defendants left them in doubt.

Appeals against conviction.

The appellants were charged at Manchester Assizes before Glyn-Jones J. with the murder of William Jackson, and were tried jointly. The trial took place on March 15, 16, 17, 18 and 21, 1955. On March 21 the appellant Murtagh was convicted of murder and was sentenced to death, and the appellant Kennedy was convicted of manslaughter and was sentenced to seven years' imprisonment.

The case arose out of an incident on the night of November 21, 1954, when a motor-car driven by the appellant Murtagh mounted the pavement of Phillips Street, Manchester, and came into collision with William Jackson, inflicting on him injuries from which he died. On that evening Jackson and his wife had spent some time drinking in various public houses and had met the two appellants. In the course of the evening an altercation arose which culminated in a fight between Murtagh and Jackson. The appellant Kennedy drove the car to Phillips Street where the Jacksons were on their doorstep and there was no doubt that Jackson pulled up a heavy iron lid of his coal cellar and flung it at the car, smashing the windscreen.

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The allegation was that the car was driven recklessly on that occasion in order to intimidate and terrorise the Jacksons. The appellant Murtagh made a complaint to the police, and then drove the car with Kennedy beside him back to Phillips Street, where it came round the corner with its headlights on. The Jacksons were still on the doorstep and it was common ground that the car mounted the pavement and struck Jackson. The car then came off the pavement and was driven by Murtagh on to some waste land.

It was the contention of the prosecution that the car was deliberately driven on to the pavement with the intention of hitting one of the Jacksons because of the trouble which had taken place earlier that night. On the other hand, it was the contention of the defence that, having ensured by their complaint that the police would soon arrive, they drove back to get the necessary particulars for a summons; that, as they came round the corner, they saw Jackson pick up the coal cellar lid for the purpose of throwing it again; that they both ducked and that the resulting swerve of the car on to the pavement was purely accidental, but that, realising from the scream that someone had been hurt, they panicked and subsequently told lies.

The following directions on burden of proof were given by the judge in his summing-up: (1) "In this case, as in all criminal trials, the burden of proof from beginning to end rests on the prosecution. You are not entitled to find either of these men guilty of anything unless, having fairly considered the evidence and arguments, you are satisfied that guilt has been proved." (2) "If you find on full and fair consideration that it is not safe to reject the account of these two men that this was a pure accident caused by the fact that when they came round the corner they saw Jackson in a threatening position . . . ready to throw and it was that which caused them to duck and the ducking which caused an inadvertent swerve on the pavement, acquit them both. But if you think that this car came round the corner and that, seeing it coming, Jackson did his best to pick the grid up and throw it, but failed because

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the car was on to him before he had a chance to throw, why then you will have difficulty in accepting the story that it was his act in standing there with the grid in his hand which caused these two to duck." (3) "If you do not think it is safe to reject the explanation of this accident put forward by the defendants, acquit them both. If you think it was an accident, acquit them both. If you reject that explanation and you do not believe it to be true then be good enough to consider the possible verdicts I explained to you at the beginning of this summing up."

The appeals came on for hearing before a court composed of Mr. Justice Hilbery, Mr. Justice Gorman and Mr. Justice Havers on May 15, and the court then directed that they should be heard by a full court of five judges.

Rose Heilbron Q.C. (*S. R. Baker* with her), for the appellant Murtagh:

In this case the dividing line between murder and accident was so thin, so narrow and so close that it was exceptionally important for the judge to put accurately, clearly and in full the direction on burden of proof. This he failed to do.

[HILBERY J.: The judge in the clearest terms told the jury what they would have to find before they could convict of murder.]

The judge clearly explained what had to be proved before murder was established, but he did not make it clear where the burden of proof lay. References to the question of burden of proof by counsel in their speeches cannot be any substitute for the judge's summing up. In a case such as the present the essential direction cannot be whittled down. Certain propositions emanate from the most modern leading authorities on burden of proof—WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr.App.R. 72; [1935] A.C. 462, and MENEINE *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr.App.R. 65; [1942] A.C. 1. First, the burden of proof means establishing a case beyond reasonable doubt; secondly, the burden of proving every ingredient is on the prosecution and never shifts.

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It is not on the defence to prove innocence. Thus, in assault or rape the burden of proving non-consent always remains on the prosecution: DONOVAN, 25 Cr.App.R. 1; [1934] 2 K.B. 498, as in bigamy does the burden of proving that the prisoner knew his spouse to be alive within the seven years last past: LUND (1921) 16 Cr.App.R. 31. If the defence is accident, it is not for the defence to prove accident; it is for the prosecution to disprove accident to secure a conviction. The judge put upon the defence the onus of proving that it was an accident. The jury must be told how and in what manner they were to be satisfied, for it is the inalienable right of a man to have the benefit of any doubt; that cannot be done by a meagre direction that the jury are to be satisfied of guilt, although no specific words are necessary.

Where evidence is called for the defence giving an explanation which might reduce the crime charged to a lesser one, the direction on that explanation is important. It should contain the following elements: first, if the jury accept the explanation they should acquit, but they should be told that it is not for the accused to prove his explanation; secondly, if they are not sure whether the explanation is true or false, they should acquit; and, thirdly, if, on the review of all evidence, the jury are left in reasonable doubt, even if the explanation of the accused is not accepted that the act was unintentional, the accused should also be acquitted. If the jury are never told about doubt, they do not know that they must consider the various alternatives.

In the commencement of the summing up the judge merely used the words "unless you are satisfied." These words were quite inadequate. The most recent authority, SUMMERS (1952) 36 Cr.App.R. 14; [1952] W.N. 185, never went so far as to say that it is sufficient to tell the jury that they must be satisfied. What was said there was that the jury should be told that they must be satisfied in such a way that they felt sure.

[DEVLIN J.: Is your point that there is one degree of satisfaction in civil cases and another in criminal cases?]

Yes. That case may appear to alter the law, but it does

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not really do so. If, however, SUMMERS (*supra*) is in effect different from WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*), it should be regarded as wrongly decided.

[STREATFEILD J.: Then one would return to the principle of benefit of doubt.]

It is necessary that the direction should be clear and plain, and one which the jury can understand. The jury should not have to work out the meaning of the words used by the judge. The fact that it is necessary in the present case to analyse the words used by the judge indicates that the jury must have been left in considerable difficulty.

J. di V. Nahum Q.C. (*Peter Astley* with him), for the appellant Kennedy:

If the decision in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) is to be regarded as the governing test, the summing up should have used the word "doubt." If SUMMERS (*supra*) purports to whittle down that decision, it must be regarded as bad law, but probably it can be distinguished on the ground that in that case no explanation was put forward by the defendant. With regard to the use of the word "satisfied," there are three degrees of satisfaction known to the law. First, there is satisfaction on the preponderance of probabilities, which is the recognized test in civil cases; secondly, there is satisfaction beyond reasonable doubt, the test in most criminal cases; and the third position is in the exceptional type of criminal case, where the defence of insanity is raised or where the burden is placed on the defence by statute, as in CARR-BRIANT, 29 Cr.App.R. 76; [1943] K.B. 607. There the degree of satisfaction is analogous to that in civil cases.

David Karmel Q.C. (*R. H. Mais* with him), for the Crown:

The duty of the judge is merely to tell the jury that the burden of proving the defendant's guilt rests throughout on the prosecution. The form of words used is immaterial. In considering whether words used can be said to amount to misdirection, one must have regard to the summing up as a whole.

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In civil cases, a jury are directed that they must look to the balance of probabilities; in criminal cases that they are directed they must be satisfied with regard to the defendant's guilt.

[STREATFEILD J.: Does not the word "satisfied" connote the degree of proof required in a civil court?]

That is not the sense in which it was used in the summing up. The jury were told that they had to be satisfied that guilt was proved.

[DEVLIN J.: Are you relying on the use of the word "guilt" as connoting something more?]

Yes. Looking at the pattern of the summing up, the thread ran through it that the jury were being told that they were not to convict unless they were satisfied that guilt was proved. BLACKBURN (1955) (*vide infra*) is an illustration of the point that the use of the word "satisfied" may be sufficient. Criticism has been made of the use of the word "safe" by the judge, but it was used by Gurney B. in WHITE (1844) 4 F. & F. 383.

[DEVLIN J.: "Safety" there clearly refers to doubt.]

Rose Heilbron Q.C., in reply:

If the use of the word "satisfied" alone is sufficient the distinction between civil and criminal cases becomes meaningless. In GINESI *v.* GINESI [1948] P. 79 it was held that adultery had to be proved with the same degree of strictness as is necessary to establish a criminal charge. In criminal law the burden of proof always requires proof beyond reasonable doubt, and the jury should be so told. SUMMERS (*supra*) dealt only with terminology; the facts were quite different from those of the present case, and the decisions of the House of Lords may or may not have been cited. With the exception of BLACKBURN (*supra*), which was a case of fraud, no case goes so far as to say that the use of the word "satisfied" is sufficient; and if the decision in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) is right, that decision is wrong. It is the right of every person charged with crime in this country to be given the benefit of the doubt, but if the

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summing up in the present case was correct, that will no longer be the position.

J. di V. Nahum Q.C., in reply:

SUMMERS (*supra*) has given rise to confusion, which can be resolved only if it is remembered that it was not a case where an explanation had been given by the prisoner. If in the first limb of his summing-up the judge in the present case had used the whole of the direction used in that case, that would have been sufficient; but in the second limb, when dealing with the explanation of the appellants that the killing was due to an accident, the direction in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) should have been followed. It would be very dangerous to rely on the general pattern of the summing up. By no stretch of the imagination can one read into the summing up a direction by the judge that, even if they did not accept the explanation of the defence, they could still acquit. When the jury are told that they must be satisfied, it must be made clear that they must be satisfied beyond reasonable doubt.

At the conclusion of the arguments HILBERY J. said that the court had come to the conclusion that the conviction in each case must be quashed and the appellants discharged. The court would give their reasons for the decision at a later date.

Cur. adv. vult.

June 7. The following judgment was read.

HILBERY J. The judgment I am about to read is the judgment of the court.

The appellants and one Derek Joseph Murtagh were tried at the Manchester Assizes before Glyn-Jones J. and a jury on March 15, 16, 17, 18 and 21, 1955, on a charge of murder in that they on November 21, 1954, at Manchester, murdered William Jackson. After the accused Derek Joseph Murtagh had given evidence, the jury, on the direction of the learned judge, returned a verdict of "Not Guilty" against Derek Joseph Murtagh. The appellant Dennis Patrick Murtagh was

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found guilty of murder and was sentenced to death. The appellant Kenneth George Kennedy was found guilty of manslaughter and was sentenced to be imprisoned for seven years.

The case arises out of an incident in Phillips Street, Manchester, after 11 o'clock on the night of November 21, 1954, when a motor-car which was driven at the time by the appellant Dennis Patrick Murtagh mounted the pavement of Phillips Street, Manchester, and came into collision with William Jackson, inflicting on him injuries from which he died in hospital a few hours later. The appellant Kennedy was sitting at the front of the car next to Dennis Patrick Murtagh, and the accused Derek Joseph Murtagh was a passenger at the back of the car.

It was clear that Derek Joseph Murtagh was in a half-drunken condition and was taking no part at all in the driving of the car at the time that injuries were sustained by William Jackson. On that evening Jackson and his wife had spent some time drinking in various public houses and had met the two appellants. In the course of the evening an altercation arose which culminated in a fight between Murtagh and Jackson. This fight was broken off when the police arrived. Murtagh and Kennedy went on to another public house where they picked up Derek Joseph Murtagh. The appellant Murtagh then drove his car with Kennedy and Derek Murtagh as passengers along Stratford Road and turned down Upper Duke Street towards the appellant's shop, No. 47 Embden Street. Mr. and Mrs. Jackson lived in Phillips Street, which is the third cross-road from Stratford Road. Murtagh then drove along a street called Bonsall Street, stopped his car outside the house which would have been the Jacksons' if the car had then been in Phillips Street, and it was alleged that Kennedy got out and smashed a bottle of beer on the window frame of a lighted window of that house at which he had aimed the bottle. The car then made a circuit and returned this time to Phillips Street where Mr. and Mrs. Jackson stood on the doorstep some 40 odd feet from the corner on the near side. The appellant Murtagh was then driving and it was alleged

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that he stopped the car beside the house of the Jacksons and threw a half brick at Mrs. Jackson, hitting her on the thigh. This the appellant Murtagh denied. Mrs. Jackson picked up the half brick and threw it back, having the luck, as she said, to smash the back window of the car as it drove off. Mrs. O'Shaughnessy, Jackson's sister, ran to a telephone and dialled 999. The appellant Murtagh then drove his car straight to Ormond Street police station, about a thousand yards away, and made a complaint that a half brick had been thrown through the window of his car. The appellant Murtagh was told by the police that the complaint could be dealt with by a summons. The appellant Kennedy then took over the driving of the car and drove back to Phillips Street, where the Jacksons were still on the doorstep. There was a considerable conflict of evidence whether on this occasion the car was driven on to or close to the pavement, but there is no doubt that Mr. Jackson pulled up a heavy iron lid of his coal cellar and flung it at the car, hitting it and smashing the windscreen. The allegation was that the car was driven recklessly on this occasion in order to intimidate and terrorise the Jacksons.

The car was then driven back to the police station after an attempt to find a squad car and the appellant Murtagh made a further complaint that his windscreen had been smashed. It appears that by this time Police Headquarters had telephoned Ormond Street police station with reports of Mrs. O'Shaughnessy's alarm and two police officers set out on foot at about the same time as the appellant. The appellant Murtagh then drove the car with the appellant Kennedy beside him and the accused Derek Murtagh in the back seat straight back to Phillips Street, where it came round the corner with its headlights on. The Jacksons still stood on their doorstep. Mrs. Jackson said in evidence that her husband had said "If they come back again I'll pick it up again." This referred to the iron coal cellar lid.

It was common ground that the car then being driven by the appellant Murtagh mounted the pavement of Phillips Street and struck Jackson, knocking him down and fatally

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injuring him. The car then came off the pavement, was driven by Murtagh on to some waste land about a quarter of a mile from his home, and Murtagh then reported to the police that his car had been stolen. It was the contention of the prosecution that the car was deliberately driven on to the pavement with the intention of hitting one of the Jacksons because of the trouble which had taken place earlier that night. On the other hand, it was the contention of the defence that, having ensured by their second complaint that the police would soon arrive, they drove back to get the necessary particulars for a summons; that, as they came round the corner, they saw Jackson pick up the iron coal cellar lid for the purpose of throwing it again; that they both ducked and that the resulting swerve of the car on to the pavement was purely accidental, but that, realising from the scream that someone had been hurt, they panicked and subsequently told lies.

The only point of substance which was raised before this court was that the direction to the jury by the learned judge was not a clear and unambiguous direction on the question of onus of proof. It was contended on behalf of both appellants that the learned judge did not make it clear to the jury that it was upon the prosecution to prove their case and that it was not for the appellants to prove that the happenings resulting in the death of Jackson were an accident. They maintained that the jury might well have understood from the direction of the learned judge that it was for the appellants to prove that the happenings were an accident. The portions of the summing-up which were in particular criticised were (1) " Well now I come to something, which is, I am quite sure, well known to you and which learned counsel have already mentioned, and that is that in this, as in all criminal trials, the burden of proof from beginning to end rests upon the prosecution. You are not entitled to find either of these men guilty of anything unless, having fairly considered the evidence and arguments, you are satisfied the guilt has been proved. I shall not strengthen that by repeating it. I have said it to you once and you will not forget it, and I shall not say any more

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about it." This passage was very near the commencement of the summing-up of the learned judge, which took some 2½ hours. (2) " If you find on full and fair consideration that it is not safe to reject the account of these two men that this was a pure accident caused by the fact that when they came round the corner they saw Jackson already standing in a threatening position—because you will remember neither of them says that he saw Jackson stoop—if you cannot reject their story that, as they came round a corner, Jackson was standing there ready to throw and it was that which caused them to duck and the ducking which caused an inadvertent swerve on the pavement, acquit them both. But if you think that this car came round the corner and that, seeing it coming, Jackson did his best to pick the grid up and throw it, but failed because the car was on to him before he had a chance to throw, why then you will have difficulty in accepting the story that it was his act in standing there with the grid in his hand which caused these two to duck. Although it is, of course, entirely for you to say, that seems to me to state the issue that you have got to decide about this last incident." (3) " Well, as I said before, if you do not think it is safe to reject the explanation of this accident put forward by the defendants, acquit them both. If you think it was an accident, acquit them both. But if you reject that explanation and you do not believe it to be true, then you will be good enough, please, to consider the possible verdicts which I explained to you at the beginning of this summing-up.

This last direction of the learned judge was at the end of his summing-up and immediately before the jury retired to consider their verdict.

As has been stated earlier, the defence of the appellants to the charge was that the swerving of the motor-car on to the footpath and the coming into contact of the car with Jackson was accidental in that it was caused through the driver of the car ducking to avoid the iron lid which he thought Jackson was about to throw at the car. It was common ground in this case that when the motor-car was driven by Kennedy into Phillips Street immediately before the occasion on which Jackson met

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his death, Jackson did in fact throw an iron grid at the car and hit the car, breaking the windscreen. In view of the earlier happenings on this night there was some substance in the case put forward by the appellants. Between the case put forward by the prosecution and the case put forward by the appellants there was a narrow issue of fact, and at least on the last occasion that the motor-car was in Phillips Street there was a very short interval of time before the car struck Jackson.

The evidence established that the appellants had twice been to the police station to invoke the help of the police and must have known when they drove for the third and last time to Phillips Street that the police would either be there by the time when they arrived or within a very short time thereafter. In addition, witnesses for the prosecution corroborated the appellants' evidence in the highly material particulars that Jackson was either lifting the coal cellar lid with the intention of throwing it or had already lifted it and was holding it up in a threatening attitude preparatory to throwing it.

Having regard to the evidence, it was pre-eminently a case where it was essential for the judge to make clear to the jury three possible positions in which the jury might find themselves, bearing in mind throughout that it was not for the accused to establish their innocence: that is to say (1) If they accepted the explanation of the accused, they must acquit. (2) Short of accepting that explanation, if it left them in doubt, they must acquit. (3) On consideration of the whole of the evidence they must be satisfied of the guilt of the accused of one or other of the crimes alleged against them.

The only way in which the learned judge in his summing-up dealt with the second position was by the use of the expression "if you do not think it safe to reject the explanation of this accident put forward by the defendants, acquit them both." No doubt the learned judge meant by that expression to make it plain to the jury that the second position was a possible one, but the expression itself is equivocal. The jury are not lawyers. To a lawyer it might mean one thing, to a layman another; but the situation should be made plain to the jury as laymen.

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As such, they might have understood it to mean no more than "If you feel you can accept." It is not possible to say that it makes the situation plain. The objection to the summing-up does not, however, rest there, for finally the judge did not make plain to the jury that whatever view they took of the explanation given by the defendants, short of accepting it, they must still consider whether, upon the whole of the evidence in the case, they were sure that the appellant Murtagh intended to do grievous bodily harm or to kill by dangerous driving on the occasion when Jackson met his death.

For these reasons, in our opinion, the summing-up, which was full and unexceptionable in all other respects, was defective on this one vital point. In the circumstances, in our view, it is unsafe to allow the two convictions to stand.

Convictions quashed.

Solicitors: Julian S. Goldstone & Co., Manchester, for the appellant Murtagh; John P. Moorley, Manchester, for the appellant Kennedy.

A note of the judgment of the court—the Lord Chief Justice, Mr. Justice Ormerod and Mr. Justice Gorman—in the appeal of Albert Raymond Blackburn on March 29, 1955, is appended to this report.

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ALBERT RAYMOND BLACKBURN

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on a count under section 12 (1) (*a*) of the Prevention of Fraud (Investments) Act, 1939, charging him with inducing one Brooks to enter into an agreement, with a view to acquiring shares of a company then proposed to be formed, by statements, promises and forecasts which he knew to be misleading or deceptive, and also on another count relating to another person and another company, the forecasts there being alleged to be misleading, false or deceptive. He

was sentenced by the Commissioner (Judge Aarvold) to two years' imprisonment. ALBERT RAYMOND BLACKBURN

The appellant in person.
R. E. Seaton and *J. M. Griffith-Jones* for the Crown.

GORMAN J., in delivering the judgment of the court dismissing the appeal, said: The main point which was put before the court was that there was a misdirection in law in that the learned judge in directing the jury on the burden of proof had not made use of the word " sure " or of the expression that they should give the prisoner the benefit of the doubt, and in particular, on that aspect of the case, that when the learned judge had referred at portions of his summing-up to circumstances in respect of which there was a conflict, he had put it to the jury in terms such as these: " You have to decide whether you believe Mr. A or Mr. B," and that it was not made clear to the jury that there might be some intermediate position in which they did not believe either Mr. A or Mr. B, but were in some doubt as to what really happened. Putting the matter quite shortly, the appellant urges before this court that that was a grave misdirection, or a failure properly to direct, on the part of the trial judge, and that the result has been such that this court ought to interfere and say that the verdict was not correctly obtained. On this point, after having heard the submissions of the appellant, the court called on the prosecution. It was rightly said that the question of the direction to the jury on the burden of proof was a matter for the judge and it would not be sufficient that counsel for the prosecution or counsel for the defence or the prisoner himself had properly told the jury what was the position. As was said by Ormerod J. in the course of the argument, the fact that counsel said something on this important matter which was not thereafter adopted by the judge might cause the jury to feel that counsel had gone too far and that the statement might, therefore, be completely disregarded. It is for the judge to deal properly with the question of the burden of proof. One matter is quite clear. It cannot be said, and this court does not intend to say, that any particular form of words is sacrosanct or absolutely necessary. The court is concerned with the question whether, whatever form of words was used, it was made quite clear to the jury that it was for the prosecution to establish the guilt of the prisoner and, if the guilt of the prisoner was not established, the prisoner must, as of right and not by way of favour, be found not guilty. This court does not subscribe to the view that a particular form of words of necessity means that the summing up was right or that the absence of a particular form of words necessarily means that it was wrong.

Bearing in mind that proposition, the court has considered

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anxiously whether the learned judge did make that quite clear, and it has considered the matter regardless of the fact that the appellant himself made clear to the jury what the position was. At the commencement of his summing up the learned judge made use of expressions of this kind: "The decision is going to be yours. You have to decide upon those charges, making up your minds what is the result of the facts which you accept and of which you are the sole judges." Then, in dealing with the first of the two charges of which the appellant was found guilty, he said: "Before you can convict a man of making a statement inducing someone to part with money in the purchase of shares by false promises or forecasts, you must be satisfied that he did it dishonestly, knowing that what he said was misleading, false or deceptive. That is the matter, of course, that you have to be satisfied about." Then, a little later, the learned judge said: "You have to be satisfied that it was done dishonestly. If you are not satisfied that it was done dishonestly, then you will consider the alternative charge whether these statements were made recklessly, and if you are not satisfied that they were made recklessly, then, of course, you will acquit altogether." Having indicated the difference between the substance of the fraudulent and the reckless charge, he went on to say: "Now, the ingredients of the particular offences are these. First of all, you must be satisfied that a statement, forecast or promise was made. Then again you must be satisfied that what was said was misleading or deceptive. . . . If it is not proved that it was false, misleading or deceptive to [the appellant's] knowledge, then it must still be proved that it was false, misleading or deceptive, but also it must be proved it was made recklessly." Repeatedly, if one follows the pattern of the summing up of the learned judge, he put to the jury in completely unequivocal words: "You must be satisfied of that which the prosecution are putting before you here. It must be proved on the first charge. If not, look at the second charge, and if it is not proved, then he must be acquitted."

That was the pattern of the learned judge in dealing with the question of onus of proof, but later in his summing up there was a paragraph which has been very strongly criticised and adversely commented upon by the appellant: "You have seen Mr. Blackburn in the box and heard him address you and talk to you, and you will have formed your own opinions as to the reliability of what he has told you. You will consider this carefully." Then he says, and great exception was taken to these words: "Then you have to make up your minds whether you believe Blackburn or whether you believe Brooks, and, when you have decided what to accept as reliable evidence, make up your minds whether those facts which you accept were statements—if you accept them—which were said and made to Brooks, whether they were misleading or deceptive and whether Blackburn knew they were misleading or deceptive and

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induced Brooks to part with his money." The words to which the court calls attention in particular are the words: "Make up your minds whether those facts which you accept were statements—if you accept them . . ." The court is clearly of the view that what the learned judge was there saying to the jury, bearing in mind what he said at the commencement, was: "It is for the prosecution to satisfy you of this case. There are facts in this case which are in dispute. Look at those facts. Make up your minds which you believe. Upon that, decide which facts you accept," or, in other words, "Find out which facts you accept here, remembering that the prosecution has to prove the case, and then, upon those facts which you accept, decide whether the statements are misleading or deceptive and whether the further elements of the charges which are necessary to be proved have been proved."

I do not propose to deal further with extracts from the summing-up. The court is quite clearly of opinion that, having regard to the direction which the learned judge gave to the jury, it was properly made clear to them that the burden of proof was on the prosecution and that, if that burden of proof was not discharged, then the prisoner was entitled in law to be acquitted.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE DONOVAN

GORDON WILLIAM PHILLIPS

1955
June 20

Sentence—Driving when Disqualified—Disqualification and Imprisonment—Period of Disqualification to Exceed that of Imprisonment—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 6.

Where a Court imposes, in addition to a sentence of imprisonment, a sentence of disqualification for holding or obtaining a driving licence; inasmuch as the disqualification must run from the date of conviction, the period of the disqualification should be substantially longer than that of the imprisonment.

Appeal against sentence.

The appellant pleaded Guilty at the County of London

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Sessions on April 5, 1955, to three offences of driving a motor-car while disqualified for holding or obtaining a driving licence and was sentenced by the Deputy-Chairman to 12 months' imprisonment and ordered to be disqualified for holding or obtaining a driving licence for 12 months.

No counsel appeared.

THE LORD CHIEF JUSTICE: The appellant was simply ignoring the sentence of disqualification previously passed on him. Parliament has treated driving when disqualified as a very serious offence. It is one of the offences in the Road Traffic Acts for which it is prescribed that a sentence of imprisonment shall be passed unless for a special reason, which cannot be suggested to exist here, the court comes to the conclusion that a fine will suffice. For instance, if a man was placed in a very sudden emergency owing to his wife or child being taken ill and he wanted to drive a car to get a doctor, that might be a special reason, but in the ordinary case the court is not given a discretion, but is told that the offender is to be sent to prison and this the court did in the present case.

Quarter Sessions in the present case passed a sentence of 12 months' imprisonment and ordered disqualification for 12 months. That has been done more than once, and it is time that courts should realise that it is not the least use disqualifying an offender merely for the period during which he is going to be in prison. To sentence an offender to 12 months' imprisonment and 12 months' disqualification amounts to disqualifying him only for the very short period of his remission. He will in all probability get a remission of one third of the sentence of imprisonment, and that means that the disqualification will be effective only for 4 months, which is not enough for such a serious offence. For that reason this court gave leave to appeal, and they want courts of quarter sessions to remember that it is not the least use disqualifying merely for the period of imprisonment. As the law stands at present, though it may be that the Road Traffic Bill now before Parliament will make an alteration, disqualification must date from

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the conviction. Therefore, if an offender is convicted and sentenced to 12 months' imprisonment and disqualified for 12 months, the disqualification will be running all the time during which he is in prison, and the disqualification will be effective only for the period of any remission he may be granted.

The court regards this as a very bad case. We do not alter the sentence of imprisonment, but we order that the disqualification be for three years from the date of conviction.

Sentence increased.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE DONOVAN

GREYHOUND RACING ASSOCIATION, LTD.

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Betting—Track where Totalisator Operated—Exclusion of Bookmaker—Permission to Enter Two Rings out of Three—Steps to Secure Space Available for Bookmaker Conveniently Carrying on Bookmaking—No Obligation to Consider Numbers of Betting Public or Numbers of Bookmakers Required to Accommodate them—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 11 (2).

By section 11 (2) of the Betting and Lotteries Act, 1934, "The occupier of a licensed track—(*a*) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (*b*) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the provisions of this section shall be guilty of an offence."

At a licensed track where a totalisator was in operation

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there were three enclosures known as the Big Ring, the Middle Ring and the Small Ring. A bookmaker applied to be allowed to make a book in the Big Ring, but his application was refused by the appellants, the occupiers of the track, who had already informed him that they were prepared to admit him to the Small Ring and who had never refused him admission to the Middle Ring. On a private prosecution by the bookmaker the appellants were convicted of contravening section 11 (2) (*a*) and section 11 (2) (*b*) of the above Act.

Held, that the convictions must be quashed as (i) the respondent had not been excluded from the track within the meaning of section 11 (2) (*a*) and (ii) the appellants had discharged their duty under section 11 (2) (*b*) by making space available where bookmakers could conveniently carry on bookmaking, *viz.*, the three rings and there was no further obligation on them, under the head of convenience, to consider the numbers of the public who wished to bet and the number of bookmakers required to accommodate them, nor had any particular bookmaker a right to make his book on a particular place in the track provided that there was room there.

Appeal against conviction.

The appellants were convicted at Middlesex Quarter Sessions on April 6, 1955, of contravening section 11 (2) (*a*) and section 11 (2) (*b*) of the Betting and Lotteries Act, 1934, and were sentenced by the Deputy-Chairman (the Hon. Ewen S. Montagu Q.C.) to a fine of £25 and ordered to pay £52 10s. costs.

At Harringay Dog Racing Track, of which the appellants were the occupiers, there were three enclosures for spectators known as the Big Ring, the Middle Ring and the Small Ring. These adjectives described the price charged for admission and not the area, the price for admission to the Big Ring, the most expensive of the three, being 8s. 6d. Bookmakers were at the material time admitted to all three rings to make their books and the rings were spaces where, in an objective sense, bookmaking could conveniently be carried on. In the Big Ring, where bets were normally in larger sums than in the other two rings, only three bookmakers were at the material time allowed to operate by the appellants who took the view that that number was sufficient. One Gershon, a bookmaker,

applied to be allowed to make a book in the Big Ring, but this application was refused by the appellants. After correspondence and appearance by Gershon before a committee of bookmakers, an offer was made to put Gershon on a waiting list without, however, giving him any priority for a vacancy. On January 14, 1955, he presented himself complete with equipment at Harringay for admission to the Big Ring and was refused. He had previously been expressly offered admission to the Small Ring and at no time was he refused entry into the Middle Ring. He then commenced a private prosecution against the appellants, preferring charges under section 11 (2) (*a*) and section 11 (2) (*b*) of the Act.

Gilbert Paull Q.C. and *Mervyn Griffith-Jones*, for the appellants.

J. F. F. Platts-Mills and *Gavin Freeman*, for the respondent.

DONOVAN J.: The appellants were convicted by a jury at the Middlesex Quarter Sessions on April 6, 1955, of the offence of contravening section 11 (2) of the Betting and Lotteries Act, 1934, and were fined. They now appeal on the ground of misdirection and lack of direction by the Deputy-Chairman on certain matters of law.

The Act of Parliament in question authorised, among other things, totalisators on racecourses, and, so that competitive facilities for betting might be available for the public, enacted as follows in section 11 (2):—" The occupier of a licensed track —(*a*) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (*b*) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the

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provisions of this subsection shall be guilty of an offence." In CUTLER *v.* WANDSWORTH STADIUM, LTD. [1949] A.C. 398, the House of Lords, affirming the Court of Appeal, decided that these provisions, being for the benefit of the public and not for bookmakers, conferred no right of civil action upon any bookmaker who considered himself wronged by their infringement, and that a criminal prosecution under the relevant provisions of the Act was the sole remedy.

A Mr. Gershon, who is a bookmaker, considered himself so wronged and commenced criminal proceedings against the appellants. They culminated in a conviction of the appellants under both paragraphs (*a*) and (*b*) of section 11 (2). Under the guidance of the learned Deputy-Chairman the jury found the appellants guilty of excluding Gershon from the Harringay Dog Racing Track by reason only that he proposed to carry on bookmaking there, that is, of an offence under paragraph (*a*); and further of failing to secure that a space was available on the track, while a totalisator was being operated, where bookmakers could conveniently carry on bookmaking on dog races, that is, of an offence under paragraph (*b*).

[His Lordship then stated the facts as set out above and continued:] On the facts as thus summarised, these questions arose: First of all, was Gershon excluded from the track? Secondly, if so, was he excluded by reason only that he proposed to carry on bookmaking on the track? Thirdly, did the appellants take the necessary steps to secure that, so long as a totalisator was operating, space on the track was available for bookmakers where they could conveniently carry on bookmaking?

On the evidence there was nothing which could justify the jury in finding that Gershon was excluded from the track. He was expressly told he could come on the track and carry on bookmaking in the Small Ring. The argument of the prosecution appears to have been that he was excluded from the track, because he was excluded from that part of it called the Big Ring. But that is neither a sound nor a common sense construction of section 11 (2) (*a*). It is unsound because section

12 (*b*) recognises the right of the occupier of the track to appropriate positions on the track for the use of particular bookmakers, and therefore, by implication to exclude other bookmakers from those positions. It is contrary to common sense because there are parts of the track, as defined in section 20 of the Act, where a bookmaker would clearly have no right to go, for example, those parts reserved for members, the offices, and indeed, any place specially appropriated to another bookmaker. If it be said that to exclude Gershon from the Big Ring was virtually to exclude him from the track altogether because his prestige and goodwill would suffer if he descended to bookmaking in the Small Ring, the answer is that a personal matter of this sort is not the affair and not the responsibility of the appellants.

The jury should, therefore, have been directed that there was no evidence upon which they could find that Gershon was excluded from the track. In his direction to them the learned Deputy-Chairman seems to have suggested that Gershon was excluded from the track altogether. He said: "When Mr. Gershon presented himself at the gate . . . he was excluded because he was going there to carry on bookmaking. There is no suggesting that there was any other reason"; and later: "Therefore, you may well feel that there is in fact no defence to that first charge." The truth is that Gershon was simply excluded from the Big Ring, and whether this exclusion was effected at the internal entrance to that ring or at the external gate of the track itself is immaterial, because everyone knew that he wanted to do his business in the Big Ring, and not elsewhere, and that he had been invited to do it elsewhere. Nor was it accurate to say that the only reason for excluding Gershon was that he was going to make a book. The evidence was that there was a further reason, namely, that there were enough bookmakers in the Big Ring already for the business there available. This, however, is a matter germane to the second question of fact which arose. On the first question the jury should have been directed that there was no evidence justifying the conclusion that Gershon was excluded from the

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track within the meaning of section 11 (2) (*a*), and that the first charge therefore failed.

That being so, it becomes unnecessary to say any more on the second question, namely, the reason for the alleged exclusion.

On the third question of fact it seems to us, with all respect to the learned Deputy-Chairman, that he again misdirected both himself and the jury. He considered the average numbers of punters in the Big Ring, and the number of bookmakers, namely 15, who had previously been allowed to cater for them and, contrasting that with the present number of three, he told the jury, in effect, that on these facts the question almost answered itself. His words were these: "Therefore, the test you have got to apply here as to whether space was made available for bookmakers conveniently to carry on bookmaking is to apply to those considerations, and those considerations only, not whether the bookmakers would go 'broke' or anything of that description. As to that, you have the evidence that even when there were more members of the public milling about in the Big Ring by a very considerable number, there was room for 15 bookmakers; that was the average. When there were 919 members of the public on an average, there was room for 15 bookmakers to carry on their business there with public order, safety, comfort and convenience. There has been no evidence from anybody that the lay-out has been altered, and, therefore, you may feel (it is a matter for you) that there is evidence available to you in that way that room can be made there without offending in any way against public safety, convenience, comfort, and so on, for 15 bookmakers. Now, on this particular day the Association refused to make available space for more than three bookmakers. They did it for the best possible motives in their minds, that they thought that that was in the public interest, but that was not what Parliament said they had to do. Parliament said they had to make available space in the circumstances that I have suggested to you, and it may be that you will find this matter extremely easy to deal with, as the other one. You may feel on that evidence,

with 919 people there, there was room for 15 bookmakers without difficulty, and that, similarly, when there were, I think it was 350 people, roughly, there would be room for four bookmakers. There was, therefore, no reason to excuse the Association from its obligation under the Act to provide room for Mr. Gershon to carry on his business conveniently when he arrived there as one of a group of bookmakers. That is the matter you have to consider."

The fallacy in this reasoning is that it proceeds upon the notion that there is a statutory obligation upon the appellants under section 11 (2) not merely to provide space where bookmaking can conveniently be carried on, but to consider, under the head of convenience, the numbers of the public who wish to bet, and the numbers of bookmakers required to accommodate them. But these are matters of the general management of the course and the running of the appellants' business, and if they put the public to inconvenience by what they do in these respects, no doubt they will soon hear about it. But to treat them as liable to a criminal prosecution in respect of a mistake in such matters is itself very suggestive of a wrong interpretation of the statute. All that section 11 (2) (*b*) requires is that space shall be available where bookmakers can conveniently carry on business. In other words the Act of Parliament is not to be evaded by admitting bookmakers under the obligation in section 11 (2) (*a*) and then making it difficult or impossible for them to do business because of the physical or other disadvantages of the allotted space. The space must be one where the business can conveniently be done. But the number of bookmakers which can conveniently cope with the business is simply a matter of management into which Parliament, very understandably, has not intruded. If the occupier of a track restricted the numbers unreasonably and in bad faith, the question might well arise whether he was not excluding bookmakers simply because they *were* bookmakers, and so was contravening section 11 (2) (*a*). No such question arises here and it is admitted that space was

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available where bookmakers could conveniently carry on bookmaking, namely, the three rings. The subsection clearly does not give any particular bookmaker the right to make his book on a particular place provided there is room there. On this second question, therefore, on the admitted facts, the direction to the jury should have been that they should acquit. This conviction is, therefore, quashed.

Conviction quashed.

The court ordered that the costs which the appellants had been ordered to pay by quarter sessions should be refunded to them, and that no costs should be allowed to either side out of county funds.

Solicitors: Herbert Smith & Co., for the appellants; Gouldens, for the respondent.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE GORMAN AND MR. JUSTICE HAVERS

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Mental Defective—Carnal Knowledge—Girl Placed out on Licence from Institution—Disobediance to Term of Licence—Licence not thereby Rendered Ineffective—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *s.* 56 (1) (*a*).

The appellant was convicted of carnal knowledge of a girl whilst placed out on licence under the Mental Deficiency Act, 1913, contrary to section 56 (1) (*a*) of the Act. The girl, who was a certified mental defective and had resided in an institution, was subsequently placed out on licence to a hospital, but at the time when intercourse with the appellant took place had, in disobedience to a term of the licence, run away from the hospital and had lived for a short time with the appellant.

Held, that a licence under the Act, being a licence to the person with whom the mental defective is placed, is not revoked by the disobedience of the mental defective to a term of it, and the girl accordingly remained a mental defective placed out on licence at the time when the appellant had carnal knowledge of her, and the appellant was accordingly, guilty of the offence charged.

Appeal against conviction.

The appellant was convicted at Essex Assizes on February 18, 1955, of carnal knowledge of a girl placed out on licence under the Mental Deficiency Act, 1913, contrary to section 56 (1) (*a*) of the Act and was sentenced by Oliver J. to eighteen months' imprisonment.

The girl had from a very early age been a certified mental defective, and after residence in an institution, was on September 2, 1953, placed out on licence to a hospital near Chelmsford until April 1, 1954. On April 1, 1954, her licence was renewed until October 1, 1954. In September, 1954, the girl left the hospital in disobedience to a term of the licence, met the appellant, who had known her for a number of years,

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and started to live with him as his wife. The appellant had carnal knowledge of her in September, 1954.

J. G. Marriage, for the appellant:

At the time of the intercourse the girl was no longer a mental defective within the meaning of the Act. She ceased to be a mental defective placed out on licence, because she herself had disobeyed a term of the licence with regard to residence and had run away from the place where she had been placed.

C. G. L. Du Cann, for the Crown was not called on to argue.

HILBERY J.: Mr. Marriage has put forward as attractively as possible the argument for the appellant, who was convicted of having had carnal knowledge of a girl who was at the time a certified mental defective placed out on licence. The indictment was preferred under section 56 of the Mental Deficiency Act, 1913, which is a section for the protection of mental defectives.

[His Lordship stated the facts and continued:] The sole question which has been debated before us is whether, in the circumstances, the girl was at the time when the appellant had sexual intercourse with her a mental defective within the meaning of section 56 of the Act of 1913. She was at the time placed out on licence from an institution and it was contended that the licence was revoked by the act of the mental defective through her being disobedient to a term of it. That has only to be stated, in our opinion, to be seen as a somewhat startling proposition. It is indeed startling to suppose that a poor creature who was a mental defective and certified as such would lose the protection of this section merely because she had been naughtily disobedient to a term of the licence. The licence, it must be remembered, is not a licence to the terms of which she gives some subscription. The licence, as we have been reminded, is to the person with whom she is placed, and the person is required, as a condition of the licence, to see that

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she resides in a particular place. The authorities of the hospital had not broken the terms of the licence. The licence was of full force and effect. I need not call attention to the terms of the Mental Deficiency Regulations, 1948 (S.I. 1948, No. 1009), under which such licence is issued, except to say that under regulation 95 (2) it is expressly provided: "A patient who is on licence shall reside with the person named for the purpose in the licence, unless the person or body granting and the persons (if any) concurring in the grant of the licence otherwise permit." Sub-paragraph (3) provides: "A licence granted under this regulation may at any time be revoked, in the case of a licence granted by the superintendent of an institution or certified home by the Board or by the superintendent who granted it, or by the Board in the case of a licence granted by the Board, and may be required by, and with the concurrence or consent of, the like persons as are authorised to grant a licence or are required to concur in a consent to the grant thereof." There is nothing in those regulations which even faintly indicates that the mere disobedience to some term of the licence will *ipso facto* revoke the licence and its effect and deprive the mental defective of the safeguards which the section provides and which are intended for the protection of such a person.

The other point which was argued by Mr. Marriage was that the girl was not a person placed on licence at the material time because she had run away from the place to which she was licensed, but, of course, she was a person actually placed out on licence, because the licence must indicate a place. She was a person who was the subject of a current licence which in fact did designate the place where she must reside or to which she was licensed.

There is, therefore, nothing in this appeal and it is dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE GORMAN AND MR. JUSTICE HAVERS

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Demanding Money with Menaces—Form of Demand—Actual Substantive Demand either Express or by Unequivocal Gesture not hearsay—Menaces—Direction to Jury.

Record of Prosecutor—Extent of Duty on Prosecution to Inform Defence.

On a charge of demanding money by menaces, an actual substantive demand, either express or by unequivocal gesture, is not an essential ingredient of the offence, nor need the menaces be express. If, although there has been no such express demand or threat, the demeanour of the prisoner and the circumstances of the case are such that an ordinary reasonable man would understand that a demand for money was being made on him, and that demand has been accompanied by menaces, whether direct or veiled, so that the balance of an ordinary mind would be likely to be upset, these two elements of the offence are established.

JACKSON AND RANDALL (1783) 1 Leach 267, followed.

It is the duty of the prosecution to inform the defence of any known convictions of the prosecutor, but they are not under the further duty of examining every kind of record to see whether anything exists which might affect his character.

Where, therefore, the prosecution had informed the defence of a conviction of the prosecutor for larceny, but, being unaware of the fact, had not further informed them that during cross-examination in his public examination in bankruptcy the prosecutor had admitted having on occasions told lies to obtain loans of money and having on one occasion forged a document,

Held, that the prosecution had discharged their duty, and that, as in view of the rest of the evidence, it was by no means certain that the jury would have returned a different verdict if the prosecutor had been cross-examined with regard to credit in respect of his admissions in the bankruptcy proceedings, the convictions must be affirmed.

Appeals against conviction.

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The appellants were convicted at the Central Criminal Court on March 29, 1955, of demanding money with menaces, and each was sentenced by Pilcher J. to two years' imprisonment.

Both the appellants were young police officers of the Metropolitan Police Force. The prosecutor Jeffries gave evidence that on the evening of February 8, 1955, he was approached by the appellant Collister in Piccadilly, who told him that he was on leave from the Merchant Navy and that he was broke. Jeffries then suggested that Collister should come back to his hotel for the purpose of arranging a night's lodging. He asked Collister for his pay book, but Collister said he had left it with a friend. When they had got as far as Golden Square, Collister produced a police warrant and said: "I am going to arrest you on a charge of importuning." After some conversation, they met the appellant Warhurst, and Collister then said to Jeffries: "This is my sergeant" and told Warhurst (who was not a sergeant): "This man invited me to come to his hotel. I am quite satisfied that he is importuning." Jeffries protested against this suggestion, but Warhurst said to him: "This is going to look very bad for you." Jeffries formed the impression that both men were endeavouring to obtain money from him but, as he had very little on him at the time, suggested meeting them the following night, and a meeting was fixed for 7 p.m. at Chancery Lane underground station. Warhurst told Collister to type out a report on the matter, but to hold it up and use it only if Jeffries failed to keep the appointment. Jeffries then reported the matter to the police and, acting on their instructions, kept the appointment for the following evening. When they met, Warhurst asked him if he had brought anything with him and Jeffries handed over £5 in one pound notes. The appellants were then arrested. Both the appellants gave evidence, and said that Jeffries had in fact importuned them. They said that they agreed to meet Jeffries on the following evening for the purpose of considering whether he ought to see a doctor and advising him on that and they arranged the place of meeting outside Chancery Lane

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station because there was a decent public house there, and that when they met Jeffries said: "I shall be tied up for half an hour, because I've got to meet a friend; go across the road to that pub. and get yourselves a drink, and I will join you later," and he then took something from his hip pocket and pushed it into the hand of one of the appellants.

Pilcher J. directed the jury: "What you have got to be satisfied with in this case is that these two men, working in concert, intended to convey, and did in fact convey, to Mr. Jeffries in the first place that they, being police officers, intended to take him to the West Central Police Station on a charge of importuning, or to put in a report about him, unless Jeffries then or later paid them money. That, I think, is putting it as simply as I can put it. You need not be satisfied that there was an express demand for money in words. You need not be satisfied that any express threat was made, but if the evidence satisfies you that, although there was no such express demand or threat, the demeanour of the accused and the circumstances of the case were such that an ordinary reasonable man would understand that a demand for money was being made upon him and that that demand was accompanied by menaces—not perhaps direct, but veiled menaces—so that his ordinary balance of mind was upset, then you would be justified in coming to the conclusion that a demand with menaces had been made, and you will probably have little difficulty in concluding that the other necessary component of the case, namely, an intent to steal, was to be inferred from the circumstances. In that event you will be justified in finding these young men guilty of the charges which are made against them."

J. F. F. Platts-Mills for the appellants.

The first ground of appeal is that Jeffries was put before the jury as a man of good character, whereas in truth and in fact he had been convicted and bound over for larceny and during his cross-examination in his public examination in bankruptcy he had admitted having told lies on more than one

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occasion for the purpose of obtaining loans of money and having forged a document on one occasion. Had that material been available to the defence at the trial for the purpose of cross-examining Jeffries to credit, the verdict of the jury must have been affected. The second ground is that the judge was wrong in leaving the case to the jury. Neither a demand nor a menace had been proved by the prosecution. To constitute the offence it is necessary that there should be some actual substantive demand, either express or by an unequivocal gesture, and there was no such demand in the present case.

Christmas Humphreys (*J. Southwarth* with him), for the Crown.

The police discharged their duty by putting the defence in possession of the fact of the conviction of the prosecutor, which is the only matter of which they were aware. They were not aware of the prosecutor's answers during the bankruptcy proceedings, but even if this matter had been before the jury, it is by no means certain that it would have affected their minds in view of the rest of the evidence and in particular that of the appellants themselves. A " demand " for the purpose of the statute has not the narrow meaning contended for on behalf of the appellants, and the judge correctly told the jury what would constitute a demand, and was also correct in telling them that menaces need not be direct, but might be veiled.

J. F. F. Platts-Mills, in reply.

I have no recollection of being informed by the Crown of the conviction of the prosecutor but I cannot dispute what has been said in court today.

HILBERY J.: The appellants, who were at the time young police officers and who had been in the police force about two years, were found guilty of having demanded money by menaces from a man named Jeffries and each was sentenced to two years' imprisonment. They appeal now on the ground of

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misdirection, and on the further ground that there was a miscarriage of justice because the principal witness for the prosecution, who was put before the jury as a man who had nothing to fear and a man of good character, had one previous conviction about a year before the present case of having stolen a book worth thirty shillings in respect of which he had been bound over to be of good behaviour. The appellants also contend that in the course of his public examination in bankruptcy that person had given answers to the Official Receiver who was cross-examining him, admitting that he had on occasions told lies in order to get loans of money and had also admitted that on one occasion he had forged a document.

It is contended here that, had that material been in the hands of defending counsel at the trial and had counsel had an opportunity of putting it to the prosecutor in cross-examination, the verdict of the jury must necessarily have been different. We are not satisfied that it was not known to defending counsel that Jeffries had been previously convicted of the theft of the book and bound over and Mr. Humphreys tells us it was known and had been disclosed in the usual way. Mr. Platts-Mills does not say that he can deny it, though he has no recollection of it. No conviction, I suppose, is lightly to be spoken of as trifling but, as convictions go, this was not a very important one or one which could be very crushing to the reputation of a witness when he was giving evidence about an issue so different and involving matters other than honesty. If the conviction was disclosed, that was sufficient so far as the police were concerned. The police are not to be expected to examine the records or see whether possibly there exists anywhere in the country any matter which might affect the character of a witness. It is their duty to disclose to the defence, in the way indicated in this court a little while ago (see *ante*, p. 20), actual convictions of crime standing on the record of the prosecutor, and we accept it from Mr. Humphreys that that course was followed in this case. Unless this other matter appearing on the record of Jeffries'

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public examination in bankruptcy was such as to destroy the case which Jeffries was asserting against the two appellants, it cannot be said that the fact that it was not used necessarily led to a miscarriage of justice. It might, and probably would, have affected the minds of the jury and made them weigh with considerable care and scan with great caution the evidence given by Jeffries but, notwithstanding that, they might have found, in the circumstances of this case and more particularly having regard to the evidence of the two appellants themselves, that they were satisfied that the offence charged against them was conclusively established.

Mr. Platts-Mills has argued that the learned judge left to the jury a case of demanding money by menaces when there was no demand and no menace. [His Lordship stated the facts and continued:] It appears to this Court that, even had the defence been in a position to cross-examine Jeffries severely on the admissions he had made in bankruptcy and cause the jury to exercise extreme caution in receiving his evidence, none the less the very account given by the appellants themselves afforded a high degree of corroboration of the story of Jeffries implicating them in the charge of having demanded money by menaces.

There remains the point which Mr. Platts-Mills has argued whether there were threats or a demand of money. He has argued strongly that there must be some actual substantive demand, either express or by an unequivocal gesture. As early as JACKSON AND RANDALL (1783) 1 Leach 267, the court held that an actual demand is not necessary and that it is a fact for the consideration of the jury whether in all the circumstances of the case there was a demand. [After citing the passage from the summing-up set out above, His Lordship continued:] In our view, that correctly expresses precisely what the jury had to decide. It was quite clear from the account which the appellants themselves were giving that on the night before there had been, according to them, statements by Jeffries which would have led them to consider that he was

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importuning for homosexual purposes. It is quite clear that there would have been talk of his being in danger of arrest and criminal proceedings for such conduct, and that he was agitated, emotional and frightened by it. It is clear that there was talk of money, that a meeting had been appointed after talk about a report being prepared on the case, and that next day the meeting was attended by the two appellants, at which—if the jury accepted the story—one of them undoubtedly received money from Jeffries. In the circumstances it is impossible to say that the jury would necessarily have come to a different conclusion if the material from the bankruptcy file had been put to Jeffries in cross-examination and it is impossible to say that the verdict was a perverse verdict. There was abundant evidence on which the jury could find, from the circumstances, that there was a demand intended and conveyed, as the judge pointed out, and it was a demand accompanied by instilling into the person to whom it was made the fear of a prosecution for importuning for an immoral purpose. In the circumstances this court is unable to do other than dismiss the appeals.

Appeals dismissed.

Solicitors: Beach & Beach, for the appellants.

CIRCUIT CASE (WELSH CIRCUIT)

BEFORE

MR. JUSTICE SELLERS

R. *v.* MAYWHORT

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Fraudulent Conversion by Trustee—Protection from Prosecution—Act first Disclosed "On Oath in Consequence of any Compulsory Process of any Court of Law or Equity"—Executor—Order by Court to Lodge Accounts and Statement—Failure to Comply—Committal to Prison for Contempt—Affidavit to Secure Release—First Disclosure of Fraudulent Conversion in Affidavit—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43 (2).

Procedure—Motion to Quash Indictment on Ground Defendant Protected from Prosecution—Time for Making Motion.

The defendant and his brother were executors and trustees of their mother's will and ultimate beneficiaries in respect of her residuary estate. The defendant obtained probate of the will and made himself responsible for the administration of the estate. On an originating summons taken out by the defendant's brother, an order was made for the administration of the estate by the court, and by a later order the defendant was required to lodge at a district registry accounts and a statement which were to be verified by affidavit. The defendant failed to comply with the order, and on a writ of attachment issued by his brother for contempt of court the defendant was committed to prison. Later, on apologising to the court and undertaking to comply with the order he was released; but on again failing to comply with the order and with a renewal order in the same terms he was again arrested and committed to prison for contempt of court. In an affidavit made during this second period of imprisonment with the object of securing his release, he disclosed for the first time that he had converted to his own use the bulk of the assets of the estate. The defendant was subsequently prosecuted for fraudulent conversion as a trustee, contrary to section 21 of the Larceny Act, 1916, and on arraignment of the defendant, before plea, the defence moved to quash the indictment on the ground that the defendant was protected from prosecution by section 43 (2) of the Act.

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Held, that the indictment must be quashed, as the defendant was protected from prosecution, the conversion constituting the offences charged having first been disclosed on oath by the defendant "in consequence of . . . compulsory process of [a] court of law or equity in [a] proceeding . . . bona fide instituted by a person aggrieved" within the meaning of section 43 (2).

NOEL 10 Cr.App.R. 255; [1914] 3 K.B. 840 and TUTTLE (1929) 21 Cr.App.R. 85 distinguished.

Per Sellers J. A motion to quash an indictment on the ground that the defendant is protected from prosecution by section 43 (2) of the Larceny Act, 1916, should be made on arraignment and before plea.

Observations on the evidence admissible on such a motion.

Trial on indictment before Sellers J. at Chester Assizes.

The defendant, Frank Havelock Maywhort, was charged on an indictment containing three counts, each of which alleged fraudulent conversion as a trustee, contrary to section 21 of the Larceny Act, 1916. The defence moved to quash the indictment, on the ground that the defendant was protected from prosecution by section 43 (2) of the Act, the conversion constituting the offences charged having been first disclosed by the defendant in an affidavit made to secure his release from prison, to which he had been committed for contempt of court in failing to comply with orders of the court requiring him to lodge certain accounts and statements at a district registry. The facts are set out fully in the judgment.

G. G. Lind-Smith for the prosecution.
Robin David for the defendant.

SELLERS J.: The defendant is indicted on three separate charges of fraudulent conversion, contrary to section 21 of the Larceny Act, 1916. The charges allege that he, being a trustee of certain property, fraudulently converted it to his own use. Section 21 deals with conversion by a trustee. The defence has moved to quash the indictment, relying on section 43 (2) of the same Act, which provides: "No person shall be liable to be convicted of any offence against

section 6, section 7 (1), section 20, section 21 and section 22 of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such an act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved." The procedure for bringing before the court the reliance on section 43 (2) was discussed by counsel for the prosecution and for the defence, and it seemed to me appropriate, although there is no clear precedent to which I have been referred, that a motion to quash could and should be taken before plea and at the outset of the case, because, if the submission that section 43 (2) applies is correct, the court would have no jurisdiction to try the case. If the case were tried, the trial would be a nullity if the submission later succeeded. In regard to the evidence which is to be adduced and the manner of its presentation on such an application, counsel for the defence was content to rely on the evidence in the depositions taken before the justices and the documents which were exhibited. It may be, however, although it is not necessary to decide this in the present case, that other evidence might be brought before the court on a motion to quash, because, notwithstanding anything that may have been revealed by the defendant in any proceedings such as those referred to in section 43 (2), the charges in an indictment might well be supported by evidence independent of that, and the subsection expressly states that a person who comes within the subsection shall not be liable to be convicted " upon any evidence whatever in respect of any act done by him."

The evidence on which the submission is made is derived very largely from documents and to a minor extent from the depositions. It appears that the defendant was appointed to be an executor and trustee of his mother's will jointly with his brother. The will was made in 1949, shortly before the testatrix died on April 20, 1949. The brother was abroad and

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the defendant, who was a solicitor, took out probate and made himself liable for administering the estate according to law. The documents showing the extent of the estate were prepared and submitted by him. The will provided, after a legacy, that the whole of the residue of the estate, both real and personal, should be devised and bequeathed to the trustees on the customary trusts to call in and convert, and that the proceeds should be divided between the testatrix's two sons, who were the defendant and his brother. By 1953 the brother was dissatisfied with the administration of the estate and consulted a solicitor. On January 14, 1953, the solicitor wrote to the defendant: "We have been instructed by your brother to take charge of his interest so far as his mother's estate is concerned, and will you please let us have at once particulars of his estate and transfers to transfer one-half of the investments." Correspondence continued for some time on a very unsatisfactory basis for the brother, so much so that by August, 1953, he was advised to take proceedings. On October 21, 1953, an originating summons was taken out in the Chancery Division in the customary form.

On December 23, 1953, the summons came for consideration before Upjohn J. in Chambers in London, where apparently the defendant did not appear. It was then ordered that the estate of Alice Maywhort, the deceased, should be administered by the court and some consequential orders were made directing an account to be taken by the District Registrar of Manchester. Those proceedings proved unsatisfactory. On January 14, 1954, a further summons was heard in London before Harman J. in Chancery Chambers. Again the defendant did not appear, and an order dated January 19, 1954, required him before 4 p.m. of Friday, February 12, to lodge at the District Registry in Manchester four different accounts which were specified and, in particular, as far as this case is concerned, under heading No. 5, to lodge a statement showing what parts, if any, of the testatrix's property were outstanding or undisposed of, and whether any

parts of such property outstanding or undisposed of were subject to any and what encumbrances, and, in each case, it was ordered that the statement or accounts should be verified by an affidavit and that all payments were to be properly vouched. Notwithstanding that, Mr. District Registrar at Manchester had to certify that certain accounts which had been lodged had not been verified by affidavit, and on March 4, 1954, before Harman J. in London, proceedings were taken to enforce the defendant to comply with the order of the court. Harman J. ordered that the plaintiff, that is, the defendant's brother, should be at liberty to issue a writ of attachment against the defendant for his contempt in not having lodged the accounts and statement which he was ordered to do, and, as a result of that, on March 8 the defendant was arrested and put in prison. That is a step which the court is entitled and empowered to take when a man deliberately flouts his obligations to the court and fails to comply with its order.

When in prison the defendant wrote a letter, dated March 11, 1954, expressing his extreme regret that he had neglected to comply with the order, undertook within one month of his release to furnish the accounts and apologised to the court. Following that letter, the matter being referred back to Harman J. in London, by an order dated March 23, 1954, the attachment of imprisonment for contempt of court was discharged and the defendant was released from prison. However, notwithstanding that experience, the defendant still failed to carry out his obligations, and, in particular, to make an affidavit in respect of the five matters which had been specified, and a renewal order in the same terms came into being on April 23, 1954, on this occasion made by Danckwerts J. in Chancery Chambers. The defendant was again ordered by a particular date to lodge with the court a statement showing what property was outstanding and how it had been disposed of, and in each case to verify what he said by affidavit, and all payments were to be properly vouched. On that, apparently, some further accounts were produced, but again

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without the affidavit. By June 3 the matter came back to Danckwerts J. for a second time, and an order was made that the defendant's brother should be at liberty to issue a writ of attachment against the defendant for his contempt of court in failing to carry out the order of April 23. On June 8 the defendant was again arrested. That arrest was on similar grounds to those causing his original imprisonment because in contempt of court he had failed to carry out the court's order and, in particular, to state the position of the estate which he was administering with regard to property which was undisposed of or outstanding. If he had made that statement, he would have had to reveal the true position.

The defendant remained imprisoned under the order of June 3 for a considerable time. It was not until well into September that his position was considered by the Official Solicitor acting on his behalf. A representative of the Official Solicitor went with another solicitor, who was a commissioner of oaths, to see the defendant with a prepared affidavit, which the defendant swore on September 22, 1954. In the course of that affidavit he made what is here said to be the first disclosure of any act done by him which amounted to wrongdoing of the nature alleged in the indictment. After saying that he has now been detained in Strangeways Prison, Manchester, for 14 weeks and upwards by order of the court of June 3, that he is sorry that he has not carried out the order and prepared in proper and suitable form the accounts ordered to be provided, and that he has no money to do so, he says in the vital paragraph (para. 4): "Save that I have paid to [my brother] sundry small sums on account of his share in the estate of my mother, the said Alice Maywhort, decd., I confess that I have converted to my own use all other assets comprised in the said estate save as aforesaid and save the dwelling-house known as No. 10 Swan Bank, Congleton, in the County of Chester. I am unable to estimate the value of this dwelling-house, but I do not think that the proceeds of sale of such dwelling-house would satisfy the share in the estate to which my brother is

entitled. There are, however, no other assets of the said estate remaining nor have I had any money or assets from which I could make good to [my brother] his said share." He then craves to be released from prison, saying that it is impossible, in the circumstances related, to comply with the order. He humbly submits that, as he has appropriated to his own use such assets as he has, in all the circumstances such accounts prepared would be needless expense and, as he is personally unable to meet the expense, he asks that he should be released. The affidavit was subsequently brought before the court, but the defendant remained in prison. He was seen on October 14, still in prison, by a detective-sergeant who was then investigating the charges which had given rise to this indictment. On March 29, 1955, he was charged before the justices with these offences, and he comes before the court on bail.

It was admitted by the prosecution that the affidavit of September 22, 1954, did disclose for the first time that the defendant had converted to his own use the property which was due to his brother, and the question arises whether section 43 (2) of the Larceny Act, 1916, has the effect which the defence submits that it has. Was the disclosure in the affidavit " in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved "? The originating summons to which I have referred was certainly a proceeding bona fide instituted by the brother, who was a person aggrieved. Was the disclosure " in consequence of " the orders to which I have referred, particularly the final order, which gave rise to a second term of imprisonment? That final order which required the defendant to give information on affidavit was made in those proceedings. The information which was ordered by the court could, but for the special provisions of section 43 (2) and, in my opinion, the fact that he was a trustee, would be refused. In the ordinary way a party to a cause can refuse to give evidence which would tend to incriminate him if he can satisfy the court that that would

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be a possible or likely effect of his answer. It is quite clear that the evidence in the defendant's affidavit would have incriminated him, but section 43 (2) deprived him of the right to take the objection that it would do so. He was bound, because of section 43 (2), to obey the order of the court, and the judge could not excuse him on the grounds that he was protected by the general rule of law.

The object of this very special provision in section 43 (2), which may serve to let a party who has committed a fraud escape criminal punishment, would appear to be to benefit beneficiaries and persons aggrieved. A trustee cannot hide behind any privilege of non-disclosure of incriminating evidence. The subsection, in effect, makes it obligatory on him to disclose the true facts. If he refuses to do that, it leaves power in the court to enforce their disclosure by imprisonment, of which this case is a striking example because on two occasions the court had to invoke its extreme powers of placing the defendant in custody. The fact that the court could do so seems to me to be due to the provision that he was bound to disclose that which would, and in the result did, incriminate him. Therefore, as section 43 (2) has so operated that the defendant was compelled to disclose to the court his wrongdoing, it can be invoked so as to protect him from being liable to conviction on the matters which he has disclosed for the first time. That is dependent on the interpretation of the provision which says that the disclosure on oath which is relied on must be " in consequence of any compulsory process of any court of law or equity. . . ." It was submitted by the prosecution that the disclosure in the affidavit to which I have referred was not in consequence of any compulsory process. I know of no greater compulsory process in the hands of the civil court than to do what was done here. The defendant was ordered to comply with the five matters in the order made against him. Because he did not do that, he was imprisoned. It is true that he could have stayed in prison, but if he wanted to get out he had to make some submission to the court, and that is customarily done by affidavit, as was done here. He was

imprisoned to compel him to comply with the order. His affidavit was in consequence of that compulsory process which was imposed on him. Its main motive was that he should be released from prison, but it was, indeed, in consequence of the fact that he was there, and that in order to get out he had to show good grounds, that he did then reveal for the first time what the true position was.

In my opinion, it would be hair-splitting to accept the argument that, since the disclosure was made in the affidavit which the defendant put in to escape the burden under which he was suffering, the position is different from what it would have been if the defendant had made the same disclosure in an affidavit in strict compliance with the order. I think that in either case the disclosure should be held to be in consequence of the heavy compulsion which the court found it necessary to impose on him.

A second point taken by the prosecution was that what was disclosed was not "any act done by him" as contemplated by section 43 (2) because it was only a general statement of the defendant's wrongdoing and did not show it in any particularity. In my opinion, that is not a submission which can stand. It may be that what has been disclosed—which really does show that the whole of the estate has gone to the defendant, except for small items at the outset paid to his brother—may not give sufficient evidence for those interested in the brother's share to follow, if they can, the proceeds of the sale. That can perhaps be ascertained in a different way. Section 43 (2) having been obviously invoked to justify the imprisonment for contempt of court, the defendant having no ground for refusing to comply with the order, its counter-effect, in my opinion, is that it can be invoked now to defeat these present charges because it provides that "no person shall be liable to be convicted of any offence against . . . section 21. . . ." if he has disclosed for the first time the matters which give rise to the charge in circumstances to which the subsection applies.

The prosecution cited two cases, NOEL, 10 Cr.App.R. 255;

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[1914] 3 K.B. 848 and TUTTLE (1929) 21 Cr.App.R. 85. The defence submitted that they are both distinguishable, and I think that they clearly are. NOEL (*supra*) arises in different circumstances. The appellant, who was in the position of a trustee, gave evidence in a civil action brought against him and was cross-examined. In the course of the cross-examination he revealed, for the first time, criminal conduct. Subsequently he was prosecuted for fraudulent conversion, and in order to make the proceedings ineffective, the defence sought to invoke, both at the trial and in the Court of Criminal Appeal, section 85 of the Larceny Act, 1861, which contains a provision similar to that in section 43 (2) of the Act of 1916. The headnote of the case in the *Law Reports* is " When an act done by a person is first disclosed by him without making any objections during cross-examination in a civil action, it is not disclosed by him ' in consequence of any compulsory process ' of a court of law, within the meaning of section 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence . . . in respect of the act so disclosed." The basis of the decision in the Court of Criminal Appeal was that the appellant was a voluntary witness. Ridley J. delivering the judgment of the court said (10 Cr.App.R. at p. 261; [1914] 3 K.B. at p. 851): " It seems to us that the expression ' compulsory process,' in section 85, signifies something more than the mere putting of a question to a witness which he may not wish to answer. If there were a compulsory examination, as in bankruptcy, or by interrogatories, or by a bill of equity, that would be a compulsory process of a court of law or equity." The learned judge, however, went on to say: " Also, possibly, if a witness claims the privilege of refusing to answer a question because his answer may tend to incriminate him, and the court orders him to answer the question, that may be a ' compulsory process ' of the court within the meaning of section 85. We do not, however, desire to decide that point, as it is not necessary to do so in the present case. In this case no such privilege was claimed, and it is not necessary for us to go further than to say that, where evidence is given voluntarily

by a witness in proceedings in a court of law or equity, it is not given 'in consequence of any compulsory process of a court of law or equity' within the meaning of section 85." The decision was on a narrow ground because it would appear that, if section 85 of the Act of 1861 and section 43 (2) of the Act of 1916 applied, the witness could take no objection that an answer would incriminate him. It would not be a valid objection. The appropriate section rules it out. Neither would it be within the compass of the judge, who so often does give a warning, to give the witness a warning that he need not answer the question. In the present case, the defendant did all he could in the proceedings to avoid answering. It was only under the sentence of imprisonment that he made any answer.

In TUTTLE (*supra*) a similar point was taken in a case of fraudulent conversion. The answer in that case, as appears from the judgment of the Court of Criminal Appeal, delivered by Avory J., was that, so far from the evidence of the appellant disclosing an act which rendered him liable to be charged with a criminal offence, the matter which was relied on was to the contrary. The appellant sought to justify what he had done and suggested that he had invested the money with the approval of his co-trustee and the beneficiary, so that the point really had no substance. It was also held that the disclosure was not made under any compulsion at all. Avory J. said (1929) 21 Cr.App.R. at p. 90: "Quite apart from the question whether there was in fact any dishonesty within the meaning of the section, it seems clear also that it was not a disclosure in consequence of any compulsory process of any court of law. It was a voluntary statement made by the accused on affidavit, in answer to the allegation which was made against him. There was no compulsion upon him to file any affidavit at all, and no compulsion upon him to make any statement at that stage, with regard to what had become of this money." In the present case, the prosecution submitted that there was no compulsion on the defendant to make any affidavit, and, in a sense, the prosecution are right,

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if the defendant had wanted to stay in prison for the rest of his life. I do not think that possibility helps their submission. The two cases to which I have referred are entirely distinguishable. The indictment will be quashed, and the defendant discharged.

Indictment quashed.

Solicitors. H. P. & H. C. Rigby, Sandbach, for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE DONOVAN

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JOHN McCARTHY

Sentence—Corrective Training—To be Regarded as Form of Imprisonment—Petty Offence—Court to Consider whether Term of Corrective Training too Long in Relation to Offence.

Corrective training is in substance a form of imprisonment, and, accordingly, where an offender who has qualified for corrective training is before a court for a petty offence, the court should consider whether a sentence of three years is a sentence of too great a length having regard to the nature of the offence, and if the court comes to that conclusion, it should pass a shorter sentence of imprisonment instead.

Appeal against sentence.

On May 2, 1955, the appellant pleaded guilty at a magistrates' court at Uxbridge to stealing a shirt and trousers, and was committed to Middlesex Quarter Sessions for sentence. On May 17, 1955, he was sentenced by the Deputy-Chairman (The Hon. E. E. S. Montagu, Q.C.) to three years' corrective training. He was aged twenty-eight at the time.

The appellant had already been convicted of larceny in March, 1952, and sentenced to three months' imprisonment, and

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again in June, 1954, when he was sentenced to a fine of £5 or one month's imprisonment in default. In February, 1955, he pleaded guilty at Middlesex Quarter Sessions to stealing a bicycle and was convicted of possessing housebreaking implements and was placed on probation for three years.

No counsel appeared.

DEVLIN J. [after referring to the appellant's previous record as set out above]: The appellant said that he had been sleeping rough for a week, that he wanted a clean shirt and trousers to make him look respectable for a job, and that he went to a bakery where he found the shirt and trousers in a locker and took them. Of course, if he had been endeavouring to take advantage of the opportunity which had been given him by probation he would have asked the probation officer who would, no doubt, have helped him and put him in touch with someone who would provide him with the clothes. The probation officer, however, says that the appellant was irregular in reporting and was not taking advantage of the opportunity which he had been given. The appellant is qualified for corrective training, and it is not surprising that the Deputy-Chairman came to the conclusion that corrective training was the right sentence, because it is quite clear that the appellant deserved a substantial sentence.

What has caused this court to intervene is this. Corrective training, although it provides a system of training from which men who are suitable can benefit, and which gives them an advantage in that way over and above the ordinary forms of imprisonment, is in substance a form of imprisonment. It is, therefore, necessary when passing a sentence of three years' corrective training to bear in mind that it is a sentence of three years' imprisonment and to consider whether it is a sentence of the right length. In this particular case the longest term to which the appellant had previously been sentenced was three months' imprisonment. This was his third offence and he was a young man. Had a court been considering the matter before 1948, we think that

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the court would have come to the conclusion that a sentence of eighteen months' imprisonment ought to be imposed. That would mean that, if he were of good behaviour, the appellant would be in prison for twelve months, which is a substantial period. This court, on the whole, has come to the conclusion that that is the right sentence in this case, and that, where there is a disparity between eighteen months and three years, corrective training becomes too severe a sentence. Accordingly, the court will substitute a sentence of eighteen months' imprisonment. To mark the fact that the gist of the wrongdoing here was the breach of probation rather than the comparatively petty offence of stealing the shirt and trousers, the sentence of eighteen months will be a sentence imposed in respect of the breach of probation, and in respect of the offence of stealing the shirt and trousers there will be a sentence of three months, to run concurrently.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE DONOVAN

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GEORGE THOMAS CLARK

Evidence—Character of Prisoner—Imputation on Character of Crown Witness—Allegation that Police Inspector told Constable to Write Falsely Contents of Statement Signed by Prisoner—Criminal Evidence Act, 1898 (61 & 62 *Vict.* c. 36), *s.* 1, *proviso* (*f*).

A statement taken down in writing by a detective-constable signed by the prisoner, which, on the face of it, amounted to a confession of guilt, was put in evidence by the prosecution. The prisoner, in his defence, said that after the caution at the head of the statement had been signed by him, a police

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inspector came into the room and dictated to the detective-constable what to write down in the statement. The inspector gave evidence for the prosecution, and the prisoner, who gave evidence in his own defence, was cross-examined by counsel for the prosecution on his previous convictions.

Held, that the cross-examination was admissible, as there had been an attack by the prisoner not confined to the evidence of the inspector, but relating to his conduct outside his evidence, and therefore amounting to an imputation on his character within the meaning of proviso (f) (ii) to section 1 of the Criminal Evidence Act, 1898.

Appeal against conviction.

The appellant was convicted at Surrey Quarter Sessions on March 21, 1955, of garage-breaking and larceny, larceny, and garage-breaking with intent, and was sentenced by the Deputy-Chairman (Brigadier Willway) to five years' imprisonment.

The appellant was charged together with three other men. His defence was that, although he was near the garage which was broken into at the material time, he had taken no part in the breaking and had not assisted the persons who did it in any way. At the trial evidence was given by police officers of a verbal statement made by the appellant at the police station after his arrest and the prosecution also put in evidence a statement by the appellant, which had been taken down in writing by a detective-constable and which, on the face of it, amounted to an admission of guilt. With regard to the verbal statement, the defence put it to the police officer that the conversation had never taken place at all, but that a somewhat similar conversation had taken place later at another police station. With regard to the written statement, it was suggested to the police inspector, and the appellant said in the course of his evidence, that, after he had signed the caution at the head of the statement, the police inspector came into the room and dictated to the detective-constable what to write down in the body of the statement. The appellant also said that he had signed the statement because he was frightened and the Deputy-Chairman permitted counsel for the prosecution to cross-examine him on his previous convictions on the

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ground that the attack on the inspector amounted to an imputation on his character within the meaning of proviso (f) (ii) to section 1 of the Criminal Evidence Act, 1898.

Robin Simpson for the appellant. The cross-examination of the appellant on his previous convictions was wrongly admitted. The line that the appellant took in his defence did not amount to an imputation on the character of the inspector within the meaning of the proviso. If the contrary view is taken, a prisoner will never be able to deny a statement alleged to have been made by him. Prior to making the written statement, the appellant had made a verbal statement to the police, which the Deputy-Chairman seems to have treated as being at least of equal importance to the subsequent written statement. He appears to have regarded the cross-examination as admissible because of the earlier statement. If he was wrong in that view, the circumstances of the later written statement and the appellant's allegations with regard to it should not be considered by the court. In any event, those allegations were so intrinsically bound up with the appellant's defence that he should have been allowed to develop it without imperilling himself or bringing himself within the limits of the proviso. [He referred to BIGGIN, 14 Cr.App.R. 87; [1920] 1 K.B. 213; STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr.App.R. 40; [1944] A.C. 315 and TURNER, 30 Cr. App.R. 9; [1944] 1 K.B. 463.] The test that should be applied in deciding whether the attack amounted to an imputation is whether the defence could have been reasonably developed without making the attack, and in the present case it clearly could not have been.

B. Stuart Horner for the Crown was not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted at Surrey Quarter Sessions along with three other men on charges of breaking and entering and larceny, larceny, and one breaking with intent. He was tried before the learned Deputy-Chairman, Brigadier Willway, and the sole question raised

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by this appeal is that the learned Deputy-Chairman permitted the cross-examination of the prisoner with regard to previous convictions, and it is said that no grounds appeared in the case which would entitle the prosecution to ask those questions.

This class of case is perhaps not as common as it used to be, but we have constantly had arguments with regard to the right of counsel to ask such questions and I agree with Mr. Simpson, to whom the court is indebted for a very thorough and careful argument, that it is a case of importance.

The case arises because of an attack made by the appellant on the police with regard to a statement he had made and signed; and any judge who has had any experience on circuit or at the Central Criminal Court, as we all have, knows that one of the commonest happenings in the case of a prisoner who has made the fullest and most complete statement admitting his offence and signed it, is that, when he comes to trial, he repudiates the statement and generally says that it was extracted by some improper means. In this case the appellant does not say that the written statement was obtained from him by any threat nor by any inducement. What he says is that he was at the police station when the detective-constable started to write down the heading of the statement, which is a caution, and then the chief inspector, in whose room he had previously been, came into the room and proceeded to dictate to the detective-constable what he was to write down, so that the statement was not the appellant's statement at all, but the statement of the chief inspector, and the appellant says it was all untrue. That means that the chief inspector, for the purpose of getting a conviction against the appellant, not only manufactured a statement, but manufactured a statement which had not a word of truth, a sufficiently serious accusation against a high-ranking police officer of considerable standing.

Another point which has arisen in the case, which apparently the learned Deputy-Chairman emphasised in the course of giving his ruling on the matter, was a verbal statement which had been made by the appellant. When he was first arrested he made various statements which, if the jury accepted

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them, as they did, would have been quite enough to ensure his conviction. They amount as near as possible to a complete confession, and the statement he made afterwards amplified what he had said before and told the whole story in the form of a confession. Mr. Simpson does not pretend that the written statement is anything but a full confession or that he could have hoped for a verdict from the jury once that statement was put before them. The first point he took—I am bound to say a word about it, although it is not the principal point—was that the learned Deputy-Chairman emphasised in the course of his ruling, and paid more attention to, what the appellant said about the verbal statement and whether that amounted to an attack on the police than to what he said about the written statement. I dare say that might be because he thought he was dealing with the matter in chronological order. Mr. Simpson invited us to say that, if the learned Deputy-Chairman was wrong in having permitted the cross-examination on that account, we could not consider what the appellant said in relation to the written statement because the Deputy-Chairman was not considering it. I am afraid we cannot take that view. The only question which the court has to decide is whether the cross-examination was legally admissible or not, and if the cross-examination was legally admissible, it is nothing to the point to say that the learned Deputy-Chairman admitted it on some other ground. We have to see whether on the whole of the case the conduct of the defence entitled the prosecution to cross-examine as to character. If what the appellant said about the written statement supplied the material or the ground for cross-examination, we need not trouble ourselves about the denial of the verbal statement, because there was only one cross-examination as to the appellant's character.

The first thing to do is to look at the statute. The Criminal Evidence Act, 1898, s. 1, entitles the prosecution to cross-examine a prisoner on several grounds, one of which is (f) "if: . . . (ii) . . . the nature or conduct of the defence is

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such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

There is no doubt that there have been a good many authorities on this point, especially in the early days of the Court of Criminal Appeal, and at first it may look as though the line is a very fine one. Indeed, it has been said in more than one case that the line is a fine one, and one sees as one goes through those cases that, as very often happens when a new statute has to be considered, the court was going very slowly and carefully, if I may use the words, into what had hitherto been somewhat unexplored country. Until the Criminal Evidence Act, 1898, except in a few cases such as rape, which was an exception introduced in the Offences Against The Person Act, no prisoner could give evidence at all. It was not, therefore, until the Court of Criminal Appeal began to sit in 1908, ten years after the Act of 1898 was passed, that there were any considered judgments with regard to the grounds on which cross-examination could be permitted or not, as I do not remember that the Court for Crown Cases Reserved gave any decision on the subject. Certainly, whatever may be said, the first duty of the court is to read the statute, consider exactly what it says and apply it; and as the court said in HUDSON, 7 Cr.App.R. 256; [1912] 2 K.B. 464, the statute does not say anything about unnecessarily introducing imputations which are unreasonable or use any qualifying words of that sort. It simply says: "or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor." We know that from an early stage in the history of this class of law it was held that, if a prisoner cross-examined the prosecutrix on a charge of rape or indecent assault to show that she had consented, that did not enable the prosecution to cross-examine the prisoner with regard to his record. A good many reasons have been given for that principle, but probably the safe ground upon which that cross-examination is not allowed is that it is always necessary in a charge of rape to establish three things, first, that there has been carnal knowledge of the prosecutrix; secondly, that the prisoner was

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the man who had carnal knowledge of the prosecutrix; and, thirdly, that it was done against the will of the prosecutrix. It is not necessary for the prisoner to prove consent. He may be able to do it by cross-examination, or to destroy her evidence by cross-examination. It is for the prosecution to prove that there was lack of consent and, therefore, the courts have decided that the prisoner is entitled, if he can, to show by cross-examination of the prosecutrix, or by giving evidence, that one of the incidents of the crime is not present, even though that may involve some imputation on her character. For instance, if she is apparently a respectable married woman and she is being asked questions as to whether or not she consented, that would seem to involve some imputation upon her. The prisoner is asserting that she did consent, and if his counsel cross-examines her on that line, it would seem that it involves some imputation; but there is no doubt that the rule is quite fixed now that the mere fact that the prisoner's counsel or the prisoner himself in evidence has alleged that the woman was a consenting party, in an effort to break down one of the essential elements of the crime, is not enough to entitle the prisoner to be cross-examined on his character. That, I think, too, may be the explanation of the case in which a conviction for manslaughter was quashed, a case on which Mr. Simpson strongly relied, BIGGIN, 14 Cr.App. R. 87; [1920] 1 K.B. 213. That was a charge of murder which was reduced to manslaughter, and the conviction was quashed because the prisoner had been cross-examined on his character. He undoubtedly did not deny that he had killed the man whose death was the subject of the charge. He said the man had made indecent overtures to him; then, there was a fight and in the course of the fight, as a matter of self-defence, he killed the man. He was then cross-examined on his convictions. There, the court felt some difficulty about the case, but the prisoner was relying on provocation or self-defence and the facts had to come out. Somebody had to explain why the attack took place, and until that was explained and why people

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were in the same room and there was a fight it was impossible for any defence to be developed at all.

In this case the appellant's defence was: "I am not one of the men who broke into the place; if I was with the people, I had nothing to do with it." He told the police in his statement that he kept watch, but his case was, "I was not involved in this matter at all." That was his defence. His defence was not that an untrue confession was extracted from him. It is true the confession was used against him to prove he was the guilty man, and the way in which he sought to escape from his confession was by saying: "I never made that confession at all. It is true the policeman wrote it down, but I never said it. It was the chief inspector who came in and told the detective-constable to write down what he told him and he did so." If that allegation were true—and it must be taken that the jury rejected it—it was about as serious a charge to make against two police officers as could well be imagined. It was not tantamount to saying: "They induced me by a promise of favour to make a confession" or "They promised that I would get off light," but it amounted to saying: "They concocted a confession which was not my confession at all and, therefore, you, the jury, ought to pay no attention to it, because this is a plot on the part of two police officers." If that is true, those two police officers were committing a criminal offence, and how it can be said that that is not casting an imputation on them I find it difficult to understand. If what the appellant says is true, those two police officers could have been indicted for conspiracy to defeat the ends of justice and also for perjury.

I think this matter, so far as this court is concerned, can be said to be concluded by two cases, both fairly early in the history of the court, which, so far as I know, have never been reversed. One is WRIGHT (1910) 5 Cr.App.R. 131. The court consisted of Darling, Phillimore and Bucknill JJ. In that case the prisoner, who had made a complete confession, said that the confession had been extracted from him by bribery, by his being given tobacco and being allowed to smoke. Darling J.,

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giving the judgment of the court, said at p. 133: "If the appellant puts it that he was improperly induced to make and sign the statement that was produced, it is difficult to imagine anything more like an imputation on a witness for the prosecution. It is imputed to the witness that, having a man in his custody, he bribed him and so by that means got him to make the confession. It is contended by Mr. Churchill that this case comes within PRESTON, 2 Cr.App.R. 24; [1909] 1 K.B. 568, in which Channell J. delivered judgment. But on what ground did Channell J. really put the decision? At [1909] 1 K.B. 575 he says: 'The present case obviously is very near the line,' and on p. 576 he says: 'The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it,' etc. The imputation in the case now before us was that the police inspector was not a fit person to remain in the force; had he done what was imputed to him there is no doubt he could have been dismissed from the force; it is the gravest possible imputation, and cannot be excused by the contention that it was the only way open to the appellant of meeting the case against him." I observe that the learned judge said that it was difficult to imagine anything more like an imputation on the witness for the prosecution. This case is even worse, because in that case the suggestion was merely that to get the confession out of the prisoner the police officers bribed him with tobacco. In this case it is said that they concocted the confession and the confession was never that of the prisoner, but was written by the police officer.

The other case to which I would refer is JONES (1923) 17 Cr.App.R. 117. There, the matter was very much the same as it is here today, and in the course of the argument Shearman J. said: "Here appellant said that the police deliberately held him up on remand after remand, and as they could not get evidence they concocted it"—that is what is said here, that as the police had not evidence they concocted it—and the Lord Chief Justice (Lord Hewart) said at p. 118: "It is one thing to deny a statement; it is another thing to say that the statement

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has been deliberately and elaborately manufactured." In giving judgment, the learned judge cited the case of PRESTON (*supra*) rather more fully than it had been cited before and I will read the passage quoting Channell J. than whom no greater authority on these matters ever lived:—"'If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it.' A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness. Applying that *ratio decidendi* to the present case, it appears to this court that it comes within the line of saying what is forbidden. It was one thing for appellant to deny that he had made the confession; but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the inspector; that seems to be an attack on the character of the witness."

Those two cases seem to be entirely in point. This was an attack by the appellant. It was an attack not on the evidence of the police inspector but his conduct outside that evidence. It is one thing to say: "That is not my statement"; it is another thing to say, as very often is said by prisoners: "Well, yes, but he misunderstood me; he has got down something I did not say; I missed it when it was being read over, but what I said was something else." They may very often give a specious and plausible paraphrase of something which would make the sense different, or sometimes the prisoner says: "The officer left out something," and in all those cases there

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really is no difficulty. One may remember in these cases that it is always in the discretion of the judge to rule out a cross-examination and tell counsel for the prosecution that he is not going to allow a cross-examination on previous convictions, and so forth. For instance, supposing the prisoner, in giving his evidence, said: "The police constable is a liar" or something of that sort. I do not want to make any joke about the matter or put it otherwise than perfectly seriously, but one knows well that police officers are regarded as fair game for cross-examination and attack. It is one thing to say: "The police constable is not telling the truth," and merely because that is said I do not believe any judge would allow a roving cross-examination into the prisoner's past. All he is doing is pleading Not Guilty with emphasis, or as Darling J. said in ROUSE [1904] 1 K.B. 184, at p. 187, that is "merely an emphatic mode of denial." It is quite another thing when a suggestion is made against police officers that they have been conspiring together to defeat the ends of justice. Mr. Simpson in the course of his argument put very forcibly this point: if we uphold cross-examination in this case, it simply means that a prisoner can never deny a statement. I would say that the answer to that is that, if a prisoner, having signed a statement to a police officer and having put his signature as is always done in two places, one at the end of the caution and one at the end of the statement, does take up the line of saying that the police have concocted the statement, he does so at the risk of having his character laid bare, if he has a character which it is his wish to conceal, because clearly, if such conduct is to be attributed to police officers, the jury is entitled to know the character of the man making the imputation, and it is not to be thought that the man who is making the imputation, if he has a list of convictions, stands in the same position as an inspector of police or any other officer who must be a man of good character.

For these reasons, which I hope I have not stated at too great length, the court is of opinion that the cross-examination

was properly admitted in this case and for that reason the appeal is dismissed.

Appeal dismissed.

Solicitors: Wontner & Sons, for the Crown.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE DONOVAN

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False Pretences—Statement of Intention about Future Conduct—Contract to be Performed in the Future—Sufficiency of Alleged Pretence—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 32.

A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as can amount to a false pretence in criminal law.

Dictum of Bowen L.J. in EDGINGTON *v.* FITZMAURICE (1885) 29 Ch.D. 459, at p. 483, not applied.

JONES (1853) 6 Cox 467, not followed.

GORDON (1889) 23 Q.B.D. 354 and BANCROFT (1909) 3 Cr.App.R. 16, explained.

A promise with regard to future conduct may, however, be coupled with a false statement of existing fact, and in such a case, if the latter can be proved in addition to the false promise, a false pretence is established.

A statement with regard to readiness and willingness to pay, though it may support a statement about future conduct, may amount to a statement that the prisoner has, as an existing fact, the power and the means to pay and, accordingly, may constitute a false pretence.

Appeal against conviction.

The appellant was convicted at Lincolnshire (Parts of Lindsey) Quarter Sessions on April 30, 1955, on seven counts of

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an indictment each of which charged him with obtaining money by false pretences and was sentenced by the Deputy-Chairman (G. G. Phillips, Esq.) to twelve months' imprisonment.

The appellant on behalf of himself and his father, who were together carrying on business as pest destructors, entered into contracts with farmers to destroy vermin on their land over a year, and he obtained payment in advance of half the annual charge. The false pretence alleged in each count was the same, and was in the following terms: " by falsely pretending that he, on behalf of C. Dent & Sons, was then bona fide entering into a contract for the destruction of moles on land in the occupation of Joseph Watson Lawson for a period of twelve months, and that he and the said C. Dent & Sons then bona fide intended to carry out their obligations under the said contract, and that he and the said C. Dent & Sons then bona fide believed that they were and would be able and willing to carry out their said obligations." It was alleged that, after obtaining the money, the appellant did not do any of the work which he had undertaken to do.

The Deputy-Chairman gave a certificate for appeal on the question whether the particulars of the offences laid were sufficient false pretences within section 32 of the Larceny Act, 1916.

Geoffrey Lane, for the appellant:

The pretences charged in the indictment were insufficient in law. A pretence with regard to the future *simpliciter* has never been regarded as sufficient. The prosecution are not entitled by purely grammatical means to turn a pretence with regard to the future into a pretence with regard to the present by alleging a promise with regard to the future as constituting a present intention. Every promise with regard to the future necessarily implies a present intention, and therefore can with sufficient grammatical skill be turned into a pretence with regard to the present. Since the first Act of 1757 (30 Geo. 2, c. 24) which constituted the offence of false pretences, there

have been only two decisions which have hinted at the proposition that a statement of present intention might be sufficient to constitute a false pretence. JONES (1853) 6 Cox 467 was a decision at Assizes, where Coleridge J. left to the jury the question whether the prisoner intended to carry out his agreement, though he expressed himself doubtful with regard to the sufficiency of the alleged pretence. In EDGINGTON *v.* FITZMAURICE (1885) 29 Ch.D. 459, at p. 483 Bowen L.J. uttered the well-known dictum: "The state of a man's mind is as much a fact as the state of his digestion." In the first case it is to be observed that the prisoner was not represented and that, although the conviction was affirmed, there was clear evidence on another count. The second was a civil case, and the dictum of Bowen L.J. has never been followed in any criminal case. [DONOVAN J.: Do you admit that the pretence in that case was a pretence with regard to the present? Yes.] The whole trend of authority from the earliest decision, GOODHALL (1821) R. & R. 461, to the present day is against a statement of intention being regarded as sufficient to constitute a false pretence. In GORDON (1889) 23 Q.B.D. 354, where Wills J. appeared to consider the point still doubtful, the pretence relied on related to a promise with regard to the very immediate future. It was, in effect, a promise that the prisoner would hand over £100 to the prosecutor in a very few seconds and that case can, therefore, be distinguished. So, too, can BANCROFT (1909) 3 Cr.App.R. 16, a case where the prisoner had started to canvass for advertisements, representing that he was about to publish a directory. The decision that the statements of the prisoner that the directory was soon to be published constituted a false pretence was based on the view that a number of preparations must already have taken place and, therefore, the prisoner was impliedly saying that he had already taken steps to prepare the directory. Strong support is lent to the present argument by the provisions of section 3 of the Summary Jurisdiction Act, 1899 (rep.) with regard to the manner in which a court of summary jurisdiction was directed to explain a charge of false pretences. That precisely

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reproduced what the courts had been saying over a number of years.

J. M. G. Griffith-Jones, for the Crown.

The decisions on this point are not altogether easy to reconcile, but the dictum of Bowen L.J. in EDGINGTON *v.* FITZMAURICE (*supra*) has never been dissented from, and it is submitted that it applies just as much to criminal as to civil cases. GORDON (*supra*) and BANCROFT (*supra*) are relied on as showing that a statement with regard to present intention may be sufficient. There may be a distinction between "I promise that I will" and "I intend that I shall."

At the termination of the argument the Registrar of the Court of Criminal Appeal handed to the Bench a report of JONES (1949) 33 Cr.App.R. 11 and the Lord Chief Justice said: "The Master wants me to refer to a judgment of mine, which I am convinced is wrong. I did no injustice, but the dicta in it are wrong. I gave an unconsidered judgment and I have known ever since that it is wrong." He then said that the Court felt obliged to quash the conviction and that they would put their reasons into writing.

Cur. adv. vult.

July 4. The judgment of the court was read by DEVLIN J.

On April 30, 1955, at the Lincolnshire (Parts of Lindsey) Quarter Sessions the appellant was convicted of a number of offences of obtaining cheques by false pretences and sentenced to twelve months' imprisonment. The Deputy-Chairman who presided over the court by which he was tried certified that the case was fit for appeal to this court upon the ground that it raised an important point of law, namely, whether the particulars of the offences as laid in counts 2, 4, 5, 6, 7, 8 and 9 of the indictment were sufficient false pretences within section 32 of the Larceny Act, 1916. The false pretence alleged in each of these counts is the same and is in the following terms:—"By falsely pretending that he, on behalf of C. Dent & Sons, was then bona fide entering into a contract for the destruction of moles on land in the occupation of Joseph

Watson Lawson for a period of twelve months, and that he and the said C. Dent & Sons then bona fide intended to carry out their obligations under the said contract, and that he and the said C. Dent & Sons then bona fide believed that they were and would be able and willing to carry out their said obligations."

As appears from these particulars, the appellant had on behalf of himself and his father, who were together carrying on business as pest destructors, entered into contracts with a number of farmers to undertake the destruction of vermin on their land over the period of a year, and had asked for and obtained payment in advance of half the annual charge. In a number of cases besides those enumerated in the indictment they had done no work at all, and the jury, as shown by its verdict, was satisfied that in those cases they never had any intention of doing the work for which they took payment and had not entered into the contract in good faith and in short were doing business dishonestly. Dishonesty is not *per se* a criminal offence; and the point that has been argued before us and which is the subject of the Deputy-Chairman's certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purposes of the criminal law. As the Deputy-Chairman said, the authorities are not easy to reconcile, and in 1889 in GORDON 23 Q.B.D. 354, at p. 360 Wills J. considers the point still to be doubtful.

The case for the prosecution is that, when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out, whereas in fact he had no such intention. It is of course undisputed that to constitute a false pretence the false statement must be of an existing fact. The prosecution contend that a statement of present intention, although it relates to the future, is a statement of existing fact. That was the view expressed by Bowen L.J. in his celebrated dictum in EDGINGTON *v.* FITZMAURICE (1885) 29 Ch.D. 459, at p. 483:—"There must be a misstatement of an existing fact: but the state of a man's

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mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." EDGINGTON *v.* FITZMAURICE (*supra*) was an action for deceit. Whatever the position may be in civil cases, we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

The first case cited to us on the point is that of GOODHALL (1821) Russ. & Ry. 461. In this case the prosecution alleged that the prisoner procured the delivery of goods to himself by falsely pretending that he would pay for them on delivery. The jury found the prisoner guilty and added that they found that at the time he applied for the goods and promised to send back the money he did not intend to return the money, but to obtain the goods and cheat the prosecutor. Garrow B. respited the judgment and the judges thereafter met and held the conviction wrong, being of opinion that it was not a pretence within the meaning of the statute 30 Geo. 2, c. 24, s. 1, but merely a promise for future conduct. We do not propose to go through all the other authorities which were cited to us to the same effect, for we are of opinion that the common law was accurately stated in the Summary Jurisdiction Act, 1899, s. 3 (rep.) which gave directions to a court of summary jurisdiction about the manner in which it was to explain the charge of false pretences. The court was to say "that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed, and that a promise as to future conduct not intended to be kept is not by itself a false pretence." We are unable for the purposes of this principle to distinguish between a promise and a statement of intention. Every promise by a person as to his future conduct implies a statement of intention about it, though not every statement of intention amounts to a promise. But it

would manifestly be absurd to hold that when such a statement of intention does amount to a promise, the accused has committed no offence, and that when it does not amount to a promise, he has. No distinction can be drawn for this purpose between "I will do it" and "I intend to do it."

There are two qualifications to be noted. The first is that a promise as to future conduct may be coupled with a false statement of existing fact, and that the words in the statutory definition are "A promise . . . is not *by itself* a false pretence." This point is illustrated by several of the cases, for example, by JENNISON (1862) L. & C. 157, where the prisoner obtained money from a woman by saying falsely that he was an unmarried man and that he intended to marry her. The court held that, while the false promise to marry could not be the subject of an indictment, the false pretence that he was an unmarried man could be, and that the prisoner was properly convicted. In the type of case which this court is now considering, it is very often possible to allege and prove that the prisoner either expressly or by implication falsely pretended that he was carrying on a bona fide business. If this fact can be proved in addition to the false promise, the conviction can be sustained. The distinction is clearly illustrated in BATES (1848) 3 Cox 201, where the false pretence alleged was that the prisoner was then intending to open a shop and that he was a provision dealer, and was possessed of a certain sum of money, £1 7s. 1½d. and so had the means of paying the price of the cheese which he sought to buy. Platt B. said at p. 203:—"It was objected, on behalf of the prisoner, that the pretences resolved themselves into a mere intention to do a future act. If all the pretences together were of that import, then the objection ought to prevail. If the intention to open a shop related simply to futurity, that would not do. But the pretence alleged that the prisoner 'was then a provision dealer,' and that was a pretence of an existing fact; so also was the pretence that the prisoner had then the means of paying, and was ready and willing to pay. In JOHNSON (1842) (2 Moo. 254) the substance of the pretence was, 'If you will

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give me the money, I will apply it in a particular way,'—a mere promise, the breach of which was remediable by a civil remedy. If that were a false pretence within the statute, all breaches of contract would expose a man to an indictment."

The words " ready and willing to pay " indicate the second qualification. Readiness and willingness to pay may suggest a statement about future conduct. It is clear from the authorities that the law does not seek to divide the future meticulously from the present. If a man says :—" If you give me the goods now, I will hand over £10," while as a matter of chronology payment follows after delivery, as a matter of business it is all one transaction. It has so far not been necessary to determine just where the dividing line between the present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promisor's readiness to perform, that is that he has as an existing fact the power and the means to perform his promise. If a man promises to pay £10 forthwith, he must imply that he has the money to hand; if he promises to pay in a week, his promise is consistent with the mere hope that he will within that period obtain the means to honour it. These considerations explain, we think, two cases much relied on by the prosecution. In GORDON (*supra*) (the case in which Wills J. at p. 360 expressed the doubt to which I have already referred) the prosecution alleged that the prisoner obtained a promissory note by falsely pretending that he was prepared to pay £100 in exchange for it. Coleridge C.J. at p. 359 said that it was objected " that we must interpret the allegation that he was prepared to advance £100, as if it meant that he was ready to do so at some future time, and that it was a mere statement of his intention that at some time afterwards he would deliver the £100. I do not think that is the true interpretation of the pretence which is stated to be false . . . It appears to me that the ordinary meaning of the allegation is : ' I am *now* prepared to give you £100 if you will sign this paper. Here is £100, and when you

sign that paper, which you will do in a moment, the £100 is yours.' That, apart from all question of existing state of mind, seems to me to be a false pretence of an existing fact—the existing fact stated being that the money was ready for the prosecutors on their signing the paper."

This point about readiness depends of course on the circumstances of the case. It is not inevitably excluded by the fact that the promise is to do an act some time ahead, for the act may be one which makes it necessary to get ready some time before. The publication of a book, for example, requires preparation. Thus in BANCROFT (1909) 3 Cr.App.R. 16, the prisoner, representing that he was about to publish a directory, started to canvass for advertisements, and in March and April obtained money in advance upon the statement that the book was to be published in May. At the time of this statement he had made no arrangements for publication. The Lord Chief Justice (Lord Alverstone) at p. 21 said:—"It was for the jury to say whether it was a statement made of an existing state of facts that he intended to get it published in May, and that the thing was in order for publication in May." This dictum must be read as a whole and cannot be cited as an authority for the view that a mere statement of intention is enough; for the Lord Chief Justice had earlier in his judgment adopted as the governing principle the statement in Archbold (now set out in the 33rd edition at p. 722) that "a promise to do a thing in future may involve a false pretence that the promissor has the power to do that thing." Without the implication that "the thing was in order for publication in May" the statement would not have amounted to a false pretence.

In the long series of authorities there is only one case in which a bare statement of intention was left to the jury as sufficient. In JONES (1853) 6 Cox 467, Coleridge J. left to the jury the question whether the accused intended to carry out his agreement, though he expressed himself as doubtful on the point. The prisoner was convicted, but, as he was also convicted on another count about which there could be no

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argument, the point was not further considered. In the view we take of the law this case can no longer be considered as authoritative.

We adhere to the view expressed in the older authorities. We need not determine whether it is a rule peculiar to the criminal law or how far, if at all, it extends to the civil law; nor need we determine the reason that lies behind it. In some of the earlier cases it is suggested that it is the credulity of the promisee that is really to blame. In the passage quoted from Platt B.'s judgment in BATES (*supra*) the reason which attracted the learned Baron is the danger that any breach of contract might expose a man to an indictment. It would not be surprising if in criminal frauds the law was more careful of the interests of the accused than in civil. However this may be, we think that the rule is so well settled that it ought not now to be departed from.

The case before this court was a simple case of a promise as to future conduct implied from the entry into a contract. It is not suggested that the appellant and his father were not carrying on a genuine business as pest destructors. It is significant that when they were charged before the magistrates the false pretence alleged was the pretence that they were carrying on a bona fide business. The evidence did not support the allegation that this representation was false and so it finds no place in the indictment. It was not suggested that the appellant had not the means to do the work if he wanted to. Nor is this a case in which there is any difficulty about drawing the line between the present and the future, or where there was any representation about immediate readiness to do the work; the appellant said he would do the work in the course of the year, and what is put against him is simply that he did not mean to do it. It was this simple issue that the Deputy-Chairman left clearly to the jury in accordance with the view that he took of the law; he told them that what the prosecution had to prove was that the appellant at the time of entering into the contracts had no genuine intention of carrying them out and that he falsely pretended that he had. For

the reasons we have given we do not think that this is a correct view of the law, and we have therefore quashed the conviction.

Conviction quashed.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINNEMORE AND MR. JUSTICE DEVLIN

CHARLES CLEMENT ABBOTT

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Joint Trial—Collapse of Case for Prosecution against Appellant—Submission of No Case to Answer—Case Allowed to Proceed because of Possible Prejudice to Co-prisoner—Evidence by Co-prisoner against Appellant—Conviction Quashed.

The appellant was indicted and tried with one W. for forgery. By the close of the case for the prosecution the case against the appellant had collapsed and a submission was made on his behalf that there was no case to go to the jury. The judge, however, allowed the case against the appellant to proceed, because he took the view that the jury could not acquit both prisoners and that the co-prisoner's case which sought to throw the whole blame on the appellant might be prejudiced if the case against the appellant were withdrawn from the jury. The jury convicted both prisoners.

Held, that, there being no evidence against the appellant at the close of the case for the prosecution, it was the duty of the judge to withdraw the case against him from the jury and that the conviction of the appellant must be quashed.

POWER 14 C.App.R. 17; [1919] 1 K.B. 572; 35 T.L.R. 283, distinguished and explained.

Appeal against conviction.

The appellant was convicted at Manchester Assizes on February 15, 1955, of forgery and was sentenced by Glyn-Jones J. to two years' imprisonment.

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The appellant was charged with his secretary, Mrs. Ruth Wales, who was tried together with him and also convicted, of forging the receipt for £2,415 for surrender of an insurance policy on the life of his wife taken out by the appellant. Mrs. Wales had made inquiries from the insurance company with regard to surrender of the policy. The whole of the case for the prosecution against the appellant rested on the evidence of a branch manager of the company, who said that he had had a telephone conversation in Leigh, Lancashire, on July 5 or 6, 1954, and that a male voice spoke to him, but he was not able to recognise the voice as the appellant's. As a result of the conversation £2,000 was paid in cash to Mrs. Wales at the appellant's house, and Mrs. Wales gave a receipt in the name of Mrs. Abbott. Her case was that she had done this at the instance of the appellant, who had promised to send his wife the money. It transpired from other evidence that at the time of the conversation the appellant had gone away to Torquay, and therefore the evidence of the branch manager, on which the whole case for the prosecution against the appellant depended, broke down. At the close of the case for the prosecution a submission was made on behalf of the appellant that there was no evidence to go to the jury against him, but Glyn-Jones J. ruled that the case against him should proceed. The appellant gave evidence in his own defence, and Mrs. Wales gave evidence in her defence seeking to throw the whole blame on the appellant. The jury convicted both prisoners.

A. P. Marshall, Q.C. (*F. G. Paterson* with him), for the appellant.

There are two grounds of appeal (i) misdirection by the judge on onus of proof; (ii) that there was in fact no case for the appellant to answer, and the case against him should have been withdrawn from the jury by the judge at the close of the case for the prosecution. The judge said in the course of his summing-up "Now the prosecution have got to prove their case against Mr. Abbott, and unless you feel you can safely reject his explanation he is entitled to be acquitted." That

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expression was also used by the judge in MURTAGH AND KENNEDY (*ante*, p. 72) and it is more fatal to the upholding of the summing-up in the present case because it fitted the facts less. In the present case, apart from the evidence of Mrs. Wales, there was no evidence on which the appellant could be convicted. This was not a case where any direction with regard to explanation was required at all. The argument for the appellant was that there was no case for him to answer. Before any question of explanation can arise there must be a prima facie case. Any summing-up which used phrases dealing with an explanation was inappropriate. It is true that in this case the judge did also tell the jury: "You are not to convict . . . unless you feel sure that he . . . is guilty," but he also used the formula on which the court acted in MURTAGH AND KENNEDY (*supra*).

[DEVLIN J.: The court did not act on any formula. It was not said that those words should not be used. The court merely concluded that, looking at that summing-up, it did not find any passages equal to passages in the present case telling the jury what to do if they were left uncertain.]

It is submitted that in the present case on the form of words used there was not an unambiguous direction to the jury on the burden of proof. [He then reviewed the evidence and continued:] At the close of the case for the prosecution, the only evidence on which the prosecution relied to support their case against the appellant had collapsed—namely the evidence of the assistant manager of the insurance company with regard to the telephone conversation. There was, therefore, no evidence against the appellant fit to be left to the jury, and the judge should have withdrawn the case from them.

Sir Godfrey Russell-Vick, Q.C. (*C. T. B. Leigh* and *Michael Schofield* with him), for the Crown.

Even if the submission that the judge should not have left the case against the appellant to the jury be correct, POWER 14 Cr.App.R. 17; [1919] 1 K.B. 572; 35 T.L.R. 283 is an authority for the proposition that, where a submission of no case to answer has been wrongly overruled and the case has been

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allowed to go to the jury, and one prisoner then gives evidence against another, the court may have regard to the whole of the evidence and is not bound to quash the conviction. In this case the evidence of Mrs. Wales became evidence against the appellant, and it was open to the jury to regard it as such.

THE LORD CHIEF JUSTICE. The appellant was indicted at the Winter Assizes at Manchester before Glyn-Jones J. and a jury for fraud committed by means of forgery on the Refuge Insurance Company.

The appellant had, some few years ago, taken out a policy for a considerable sum of money under the Married Women's Property Acts on the life of his wife, which became her property. He had been paying a premium of something over £900 a year. About the year 1954, differences arose between the parties and they separated. Mrs. Abbott went to live in Jersey, while the appellant continued to live in Lancashire, where he had a house in one part, and an office in another part, of Leigh. He had in his employment a secretary, Ruth Wales, who was indicted with him, and it will be seen during the course of this judgment how the offence was committed. When Mrs. Abbott, the beneficiary under the policy, was living in Jersey, on June 18, 1954, an enquiry was put through by somebody—it is not denied that the somebody was Mrs. Wales—to the local office of the insurance company with the object of discussing a surrender of this policy. The manager had been a Mr. Smethurst, and possibly if he had remained in charge of this branch this fraud would not have been carried through, but he had been succeeded by a Mr. Burns. There is no question that on June 18, 1954, a conversation took place between Mrs. Wales and Mr. Burns, the object of which was to enquire what would be the surrender value of the policy. The policy was to be surrendered and a cash payment made, and Mr. Burns said he would take up the matter with the Head Office, and so forth. Another conversation took place on June 29, and this time the conversation was between Mr. Burns and a Mrs. Warburton, who was a daily help at the

house where the appellant lived. On that occasion Mrs. Warburton, who was called as a witness, and who certainly from what the court has seen of her evidence may be assumed to have been a truthful witness, said she told Mr. Burns that Mrs. Abbott was away.

Now comes the really material part of the story, and indeed the part of the story upon which the whole case for the prosecution against the appellant rested. Mr. Burns said that either on July 5 or 6—he thought it was the 5th but agreed it might have been the 6th—he had a conversation on the telephone with somebody. Mr. Burns, in giving his evidence both before the magistrates and at the assizes, was enabled by reference to the communications which passed between him and his Head Office not only to fix the date but to be certain about it, and said he was quite sure it must have been the 5th or the 6th, but it does not matter which it was. Everyone knows that people make mistakes about dates, and that it is very easy to make a mistake about a date, but in this case the question of date was of the utmost importance. By the time when he came to the assizes Mr. Burns had realised that the matter was of the utmost importance, because he was perfectly firm about it in his evidence-in-chief and in cross-examination that on the 5th, or it might have been the 6th, that conversation took place. The conversation was to this effect: He initiated the call and somebody answered; it was not Mrs. Warburton, but he thought it might have been, and the person who answered said that Mrs. Abbott was away and added: "but Mr. Abbott is at hand, would you like to speak to him?" A male voice then spoke to Mr. Burns. Mr. Burns has never pretended he was able to say that it was Mr. Abbott who spoke to him or that he recognised Mr. Abbott's voice or anything of the sort. The conversation which then took place on the telephone was such that, if the prosecution could have shown that it was Mr. Abbott speaking, there would have been no doubt he was a party to the fraud which ultimately took place. On July 15, in consequence of an appointment, Mr. Burns attended at Mr. Abbott's house when Mr. Abbott was

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not there and paid over the amount of money, considerably over £2,000, in cash to Mrs. Wales. Mrs. Wales gave a receipt in the name of Mrs. Abbott and Mr. Burns and his clerk, who went with him, got £5 back for their trouble. It was a somewhat curious proceeding, but there it is. If this money had been paid by cheque, there would have been very little difficulty, I daresay, in finding what the truth of the story was, if any precautions had been taken. The conversation on the telephone was about paying over £2,000 in the way I have described.

When the case for the prosecution was put forward, the whole case against the appellant centred upon the fact that he was a party to the conversation on July 5 arranging that this policy should be surrendered and that the money should be paid over to Mrs. Abbott. It is curious that no evidence was ever given that Mrs. Abbott did not have the money, but it was assumed all the way through, and the case was fought on the ground, that Mrs. Abbott never did have the money. At any rate, we are told that she has brought an action against the Refuge Insurance Company for the money, and that no doubt initiated this prosecution.

That was the whole of the evidence against the appellant, but the case broke down absolutely. It broke down because it transpired from Mrs. Warburton's evidence that she went away for her holiday to North Devon on June 29, so that she could not have been speaking on the telephone at this place in Leigh to Mr. Burns on July 5. Mrs. Warburton's evidence was that not only had she gone away for her holiday to the West of England but also the appellant had gone away to Torquay.

Therefore, the evidence of Mr. Burns, upon which the whole of this case depended so far as the appellant was concerned, entirely broke down. There was no other evidence at all worthy of being called evidence fit to be left to the jury to show that he was a party to the forging of the receipt and the taking of the money. Mrs. Wales, however, was in the position that she received the money and had given the receipt in

Mrs. Abbott's name. Her case, as was abundantly clear from the examination by her counsel, was that she had been told by Mr. Abbott to do this, that she took the money on his authority, that he told her to sign Mrs. Abbott's name, and that the money was going to be sent to Mrs. Abbott in Jersey after it was received. Of course, if that was so, if she honestly believed that she had Mr. Abbott's authority to sign this name, although she ought to have had Mrs. Abbott's authority, and if she believed that he was going to send the money to Mrs. Abbott, which was her case, she would have been entitled to be acquitted.

At the close of the case for the prosecution, counsel for the appellant submitted to Glyn-Jones J. that there was no evidence to go to the jury; nor was there. There was no evidence at all because, as the learned judge pointed out later in his summing-up, the case which had been carefully built up and on which he stood his trial, completely collapsed. There were a few other matters relied on, for instance, the fact that the appellant had denied at some time to the police at the first interview that he knew Mr. Burns. There is no question that he knew Mr. Smethurst, the previous manager, and he did say at one time that he had never spoken to Mr. Burns. Afterwards, he corrected that and said he remembered he had spoken to Mr. Burns. It seems to me that the fact that a man might have spoken to somebody once about a matter would be a very slender ground to put forward as the only ground for the allegation that he had been a party to this gross fraud.

All the members of the court are of the opinion that at the close of the case for the prosecution there was no evidence against the appellant at all, and that was the opinion of the learned judge, because when he came to sum up to the jury he stated that that was his opinion, and he then went on to say why, in all the circumstances, he thought it right to leave the case to the jury.

Then happened what would be expected to happen. The appellant gave evidence denying that he knew anything about

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the conversation, and throughout he stuck to his story that he knew nothing about it, and I daresay in some respects he made an unsatisfactory witness. People on their trial often do make unsatisfactory witnesses. The jury may have taken an unfavourable view of him as a witness, but he did not supply any direct evidence against himself that he had any part in this fraud. Mrs. Wales went into the witness box and put the whole blame on him. Of course, if she did not put the whole blame on him, she might just as well have pleaded Guilty because she had had the money, and had signed somebody else's name, and unless she could show circumstances which would lead the jury to suppose that she had done it without intent to defraud because she thought Mrs. Abbott was going to get the money and that she had signed for the money at the instance of her employer, she could not hope for an acquittal. As often happens, the jury convicted both.

Reliance is placed for the prosecution on POWER, a decision of this court, 14 Cr.App.R. 17; [1919] 1 K.B. 572; 35 T.L.R. 283, for this purpose: It is said that if a judge wrongly overrules a submission of no case and allows the case to go to the jury and then prisoners give evidence and one gives evidence against the other, this Court is not bound to say that it will quash the conviction because it may take into account the whole of the evidence given. But POWER (*supra*) did not decide that, if there was no evidence against a man who was indicted along with another person, it was right to allow the case to go to the jury against that man, or that, if there was no evidence against him, it was other than a wrong decision in law to do so.

I think what possibly led the learned judge to act as he did when he was of opinion that there was no evidence against this appellant was that he had got into his mind that the jury could not say in this particular case: "We find a verdict of Not Guilty in the case of both, because we are not satisfied which was guilty, if one of them was." With great respect to the learned judge, that is not the law. If two people are jointly indicted for the commission of a crime and the evidence

does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of Not Guilty in the case of both because the prosecution have not proved the case. If, in those circumstances, it is left to the defendants to get out of the difficulty if they can, that would put the onus on the defendants to prove themselves not guilty. My brother Finnemore J. remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time of the murder; but the prosecution could not show that sister A or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which one. Although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained rather than that there should be a failure in some particular case. If the learned judge, as we think is clear from what he said to the jury in his summing-up, had in his mind that he could not allow the jury to be left with the opinion that they could not acquit both, with all respect to the learned judge, we think he was wrong. No doubt he felt, having that view in his mind, that if he stopped the case against this appellant, he then would have to say to the jury: "You must convict Mrs. Wales because, as I have told you, one or the other must have done it and, as there is no evidence against Mr. Abbott, Mrs. Wales must have done it." Of course, that was not the line the judge should take; if there was no evidence against Mr. Abbott, Mr. Abbott was entitled to be acquitted and to leave the dock. The jury would then still have to decide whether they were satisfied that Mrs. Wales committed the offence. They would hear her defence alleging that it was the appellant who committed the offence. If the jury did believe that she signed for this money in the honest belief that in what she was doing she was not acting fraudulently but for the benefit of Mrs. Abbott, she would be entitled to be acquitted. If, on the other hand, the jury came to the conclusion that she signed something without authority and

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that the story that she thought the money was going to Mrs. Abbott was all untrue, then the prosecution had proved a case against her. It is only fair to the appellant to point out that the jury could not have accepted Mrs. Wales' evidence, because they convicted her although she endeavoured to put the whole burden on the appellant.

The question, therefore, is really whether POWER (*supra*) obliges us to take a different view and to say that as the learned judge, although in our opinion wrongly, allowed the case against the appellant to go to the jury, we must uphold the conviction because Mrs. Wales did give evidence against the appellant. The first case to which I called attention during the course of the argument was the judgment of Channell J. in COHEN AND BATEMAN, (1909) in 2, Cr.App.R. 197, at p. 207, which is a case which has often been treated in this Court as the most classic judgment on the subject of the construction of section 4, subsection 1, of the Criminal Appeal Act, 1907. The learned judge said: "Taking section 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to show that, on a right direction, the jury *must* have come to the same conclusion." There is no question about the proviso arising in this case. Here we have a question whether or not there was a right decision in point of law by the judge. In our opinion, the learned judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant, and therefore he was wrong in law in giving that decision.

It is said that POWER (*supra*) has given a different interpretation to the section. There is no question that in POWER'S case (*supra*) a submission had been made to the learned Commissioner at the Central Criminal Court which he overruled. Then both prisoners went into the box, and one prisoner gave evidence against the other and the co-prisoner supplied certainly considerable evidence against the appellant. The court in that case actually quashed the conviction on the

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ground that the summing-up was entirely defective and had never put the appellant's case to the jury at all. That was the decision of the court, and it is rather remarkable that in the report in 35 T.L.R. 283, that is the point that is reported. The point about one prisoner giving evidence against the other is not dealt with at all. But what we desire to point out with regard to POWER's case (*supra*) is this: The court was not pronouncing upon whether the judge ought to have stopped the case at the end of the case for the prosecution; and it is observable that Mr. Eustace Fulton, arguing for the Crown, submitted ([1919] 1 K.B. at p. 573) that: "There was evidence given by witnesses for the prosecution that some of the stolen property was found in the possession of the appellant." Whether the court was dealing with the case on the footing that there was no evidence against Power, we do not know. What the court said in that case was that if the case did go to the jury, then the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that this court must, but that it might take the whole of the evidence into account. They certainly did not say that, if there was no evidence against one of two or more prisoners, the learned judge could simply leave the case to the jury to see whether, when the case for the defence was opened, one or other of the prisoners would support the case set up by the prosecution.

Another point which seems to me to be very necessary to take into consideration in deciding the present case is this, that with all respect it cannot be right for a judge to leave a case to the jury where the whole of the structure upon which the prosecution has been built up to that moment collapses and falls, for that is what happened in this case. Once it was shown that neither Mrs. Warburton nor the appellant could have taken part in the telephone conversation upon which the whole of the case for the prosecution was built, it seems to me that it was not only the duty of the judge to say, but

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it was the prisoner's right that it should be said: "The case against me has collapsed; I am not called upon to answer the case any further." If it were to be said: "You go into the box and satisfy the jury that you did not have any of this money," that would be putting the onus on the appellant. He was kept there with his fellow prisoner, she had still to give evidence, she had a very strong case to answer, and her answer was to try to put the blame on him.

For these reasons, the court has come to the conclusion that this verdict cannot stand on any standard we can apply. Therefore, the appeal is allowed, the conviction is quashed and the appellant is discharged.

Conviction quashed.

Solicitors: A. Bieber & Bieber, for the appellant; Cyril C. Harrison, Manchester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINNEMORE AND MR. JUSTICE DEVLIN

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GEORGE ALFRED HEPWORTH
NORMAN FEARNLEY

Summing-up—Burden of Proof—No Set Formula—Reasonable Doubt—Something more than Word "Satisfied" Required.

There is no set formula for explaining to the jury in a summing-up that the burden of proof lies on the prosecution. To tell them that they must be satisfied by the evidence so that they can feel sure that the prosecution has established the guilt of the prisoner is appropriate. Merely to tell the jury that they must be "satisfied" with regard to the prisoner's guilt is insufficient. The use of the phrase "reasonable doubt" is better avoided.

SUMMERS 36 Cr.App.R. 14; [1952] W.N. 185, commented on and approved.

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Appeals against conviction.

The appellants were convicted at Bradford Quarter Sessions on April 19, 1955, of receiving a quantity of waste wool and were sentenced by the Recorder (Frank Beverley, Esq.), Hepworth to two years' and Fearnley to eighteen months' imprisonment.

Rudolph Lyons, Q.C. (*Edward Lyons* with him), for the appellant Hepworth.

The summing-up was unsatisfactory in the manner in which it dealt with burden of proof. Nowhere did the Recorder use the words "doubt," "onus," "proof," "sure" or "explanation." He merely told the jury not to convict unless they were "satisfied" of certain facts. [He referred to SUMMERS, 36 Cr.App.R. 14; [1952] W.N. 185.]

Edward Lyons for the appellant Fearnley adopted the same argument.

J. S. Snowden, for the Crown.

The court has never said that any particular formula of words is necessary to render a summing-up adequate with regard to direction on burden of proof. The summing-up in the present case might have put the matter more clearly, but, regarded as a whole, it was sufficient.

THE LORD CHIEF JUSTICE: The appellants were convicted before the learned Recorder of Bradford of the offence of receiving wool, an offence which is by no means uncommon in Yorkshire. I have no doubt that for the most part juries there —at any rate, juries drawn from the citizens of Bradford— know perfectly well what their duty is in trying offences of that description. They have to find and feel sure that the goods have been stolen, that they have come into the possession of the prisoner and that the prisoner knew they were stolen at the time when they came into his possession.

Having read the evidence in this case, one is not surprised

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that the jury found the appellants guilty. The jury were certainly out a very long time, probably over an hour and a half, before they found a verdict of guilty. Complaint is made that the learned Recorder in summing up did not give the jury any sufficient direction with regard to the burden of proof or the manner in which they were to regard the evidence or the degree of certainty they were to feel.

First of all, it is always desirable that a jury should be told that the burden of proof is on the prosecution. I have no doubt that in most cases they know it, but it is desirable that they should be told that it is for the prosecution to prove the case. It is also most desirable that emphasis should be laid upon that in a receiving case. In a receiving case it is generally desirable, although there may be circumstances in the particular case which would not render it necessary, first, to remind the jury that the burden of proof remains on the prosecution and, secondly, to tell them that if an explanation for possession of the goods is given by the prisoner and although the jury may not be convinced that it is true, if they think it may be true, it would mean that the prosecution have not proved the case because the jury would remain in some degree of doubt. It is not necessary to use on all occasions the formula which was used in ABRAMOVITCH'S CASE (1912) 7 Cr. App.R. 145 because that case, which is constantly cited in cases relating to receiving, as I have said more than once in giving judgment in appeals, lays down no more than this: if the explanation given by the prisoner, which, when he has given it, becomes part of the sum of evidence in the case, leaves the jury in doubt whether he honestly or dishonestly received the goods, the prisoner is entitled to be acquitted because the case has not been proved. A case is never proved if the jury is left in any degree of doubt.

Another complaint that is made in this case is that the Recorder used only the word "satisfied." It may be, especially in view of the number of cases recently in which this question has arisen, that I misled courts when I said in SUMMERS (36 Cr.App.R. 14, at p. 15; [1952] W.N. 185)—and I still

adhere to it—that I think it is very unfortunate to talk to juries about reasonable doubt, because the explanations given of what is and what is not a reasonable doubt are so very often extraordinarily difficult to follow and it is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is no real guidance. To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hestitate over something and another member might say that that same thing would not cause him to hesitate at all. I, therefore, suggested in that case that it would be better to use some other expression, by which I meant that it should be conveyed to the jury that they should convict only if they felt sure of the guilt of the accused. In some cases the word "satisfied" has been used. It is said that the jury in a civil case has to be satisfied and, therefore, one is laying down only the same standard of proof as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards; therefore, one would be on safe ground if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt" and one could also say: "You must be completely satisfied" or better still: "You must feel sure of the prisoner's guilt." But I desire to repeat what I said in the case of KRITZ (33 Cr.App.R. 169, at p. 177; [1950] 1 K.B. 82, at p. 89): "It is not the particular formula of words that matters; it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence," that is enough. I should be very sorry if it were thought that cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they

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must feel sure of the prisoner's guilt. If that is done, that is enough.

Comment has been made on the use by the learned Recorder of the word " satisfied " only in this case and we have come to the conclusion that the summing-up was not satisfactory; but again I emphasise that this is a receiving case and in a receiving case it is always more important that the onus of proof should be stressed because there are different views which may be taken of the explanation the prisoner may give. It may not be a convincing explanation. Of course, if the jury think it is untrue, there is an end of it, they need not regard it any more; but if they can say: " Although we are not satisfied that that explanation is right, it may be right," that is enough to entitle the prisoner to an acquittal, because the jury are left in doubt.

I hope it will not be thought that we are laying down any particular form of words which must be used, but we are saying it is desirable that something more should be said than merely telling the jury they must be " satisfied." For these reasons the convictions, in our opinion, must be quashed.

Convictions quashed.

Solicitors: Sidney Torrance & Co., for Jack Levi, Leeds, for the appellants; W. H. Leathem, Town Clerk, Bedford, for the Crown.

BEFORE

MR. JUSTICE HALLETT, MR. JUSTICE PEARCE AND MR. JUSTICE HAVERS

JOHN EDWARD LESTER
TREVOR HUMPHREY BYAST

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Possessing Housebreaking Implements by Night — Possession — Implements in Boot of Motor-Car Owned and Driven by One Appellant—Other Appellant a Mere Passenger in Car—No Evidence of Participation in Housebreaking Expedition—Larceny Act, 1916 (*6 & 7 Geo. 5, c. 50*), *s.* 28 (2).

L. and B. were convicted of being found by night having in their possession implements of housebreaking. Most of the implements were found in the boot of a car owned and driven by B., but some were found on B.'s person. L. was a passenger in the car. The police had seen both L. and B. in the act of stealing petrol from another car, but there was no evidence of joint participation on their part in any enterprise of housebreaking.

Held, (i) that the conviction of B. must be affirmed, as, in view of implements having been found on his person, there was clear evidence of possession within the meaning of section 28 (2) by him, and, *semble*, even apart from this, the presence of the implements in the boot of his car would have constituted possession.

THOMPSON (1869) 11 Cox C.C. 362 at p. 364 referred to.

(ii) that the conviction of L. must be quashed, as the mere fact that he was a passenger in a car containing housebreaking implements was not sufficient to constitute possession on his part.

Appeals against conviction (on certificate).

The appellants pleaded Guilty at Middlesex Sessions on July 5, 1955, to larceny of petrol, and were each sentenced by the Deputy Chairman (The Hon. E. E. S. Montagu, Q.C.) in respect of this offence to 3 months' imprisonment. They were also convicted of being found by night having in their possession implements of housebreaking, and for this offence each was sentenced to 2 years' imprisonment, to run consecutively to the other sentence.

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Hallett J., Pearce J., Havers J.

Two pairs of gloves and a piece of celluloid were found in the cubbyhole of a motor-car owned and driven by the appellant Byast. Other implements of housebreaking were found in the boot of the car, and others on the person of Byast. On the night in question the appellant Lester had been a passenger in the car. The car had been temporarily left some 45 yards from another car, from which the appellants were seen by the police to be stealing petrol for the purpose of replenishing the supply of petrol in Byast's car. The Deputy Chairman granted both appellants a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question of the nature of the possession which must be established to support a charge of being found by night in possession of implements of housebreaking.

L. J. Verney, for both appellants:

To constitute the offence actual possession by the prisoner is required, and constructive possession will not suffice: HARRIS (1924) 18 Cr.App.R. 151. This was not made clear to the jury in the summing-up. So as far as the appellant Lester is concerned, there was no evidence of any kind of actual possession by him. It was never clearly established that he was party to anything more than the stealing of petrol.

J. H. Buzzard, for the Crown:

There was clearly evidence of possession sufficient to satisfy section 28 (2) of the Larceny Act, 1916, in the case of Byast, inasmuch as, in the first place, some of the implements were found on his person and, in the second place, others were found in a car of which he was the owner and which he was driving at the material time. With regard to Lester the case is admittedly different, but it is submitted that he was in constructive possession of the implements in the car, and further, the possession of Byast can in law be attributed to him, inasmuch as the jury were entitled to infer from the evidence that the two were taking part jointly in a housebreaking expedition: THOMPSON (*supra*).

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HALLETT J.: On July 5, 1955, the two appellants pleaded Guilty at Middlesex Sessions to a charge of larceny, for which they were sentenced by the Deputy Chairman to 3 months' imprisonment, and were convicted by the jury on charges under section 28 (2) of the Larceny Act, 1916, of being found by night having in their possession, without lawful excuse, implements of housebreaking for which they were sentenced to 2 years' imprisonment, to run consecutively to the other sentence. The appeals are brought under section 3 (*b*) of the Criminal Appeal Act, 1907, upon the certificate of the Deputy Chairman, that a question fit for the consideration of this court is involved as to the nature of the possession which must be established in order to support a charge under section 28 (2).

The question of possession arises in various connections. It may arise, for instance, under section 15 of the Forgery Act, 1913, or under section 23 of the Firearms Act, 1937. But it most often arises, and accordingly has most often been considered, in connection with charges of receiving stolen property. To support such a charge it must be proved that the property in question was stolen; secondly, that the accused person took it into his possession; and thirdly, that at the time of such taking he knew that it was stolen. It is now well settled that it may be sufficient, as regards the second element, to establish what has been called a constructive possession, as distinct from a physical possession, by the accused person. For instance, if the police find on the accused person a cloakroom ticket and, by means of that ticket, recover from the cloakroom what can be proved to be stolen property, the only remaining point to be established, to support the charge of receiving, is guilty knowledge.

On the other hand, if what is recovered from the cloakroom by means of a ticket found by night on the accused person is a collection of housebreaking implements, it seems to be clear that he has not been found by night having in his possession implements of housebreaking. The object of the provision in section 28 (2) of the Larceny Act, 1916, is clearly to anticipate

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and make burglary more difficult by penalising possession during the night of implements which can be used for that purpose, and implements deposited in a cloakroom cannot, for the time being, be so used.

The only case which has been brought to our attention in connection with this point is HARRIS (1924) 18 Cr.App.R. 157, but we can derive no assistance from that case because the points there involved and decided by the court were not points with which we are here concerned. In the present case the implements with which we are concerned were not deposited in a cloakroom, but were found, for the most part, in the boot of a motor-car, and, as regards two pairs of gloves and a piece of celluloid, in what is commonly called the cubbyhole of the car. This car was admittedly owned by the appellant Byast. It had been driven round by him that night and had been temporarily left by him standing about 45 yards from the place where the appellants were seen by the police to be stealing petrol from somebody else's car in order, as they admitted, to replenish the petrol supply in Byast's car.

In these circumstances it seems to us that the housebreaking implements found in the boot of the car were found in the possession of Byast within the meaning of section 28, and we would refer to what was said in THOMPSON (1869) 11 Cox C.C. 362, more particularly in the interpolations at p. 364, where Lush J. says " Or if a burglar were to hire a little boy to carry his implements, could he not be convicted under [the relevant section] ?" and Blackburn J. says " Or if the implements were in a pannier on an ass's back, could the donkey be said to be in possession of them ?" That case was decided by a very powerful court, and those two interpolations seem to us to indicate what the learned judges concerned would have thought to be the true view when the implements were being carried, not by a little boy or by an ass, but by the more modern method of a boot of a motor-car. We have thought it right, as the matter has been argued fully before us, to express our view with regard to it, but, so far as Byast is concerned, we do not regard that

expression of our view as really necessary, and it is the practice of the court to refrain from expressing a final opinion on any question of law which is not necessary for the determination of the appeal. In the present case there was ample evidence that housebreaking implements were actually found by the police on the person of Byast as distinct from those found in the car, and, so far as his case is concerned, therefore, the point raised by the certificate of the Deputy Chairman does not seem to us necessary to decide. We have no hesitation in affirming his conviction.

With regard to Lester, on the other hand, somewhat different considerations arise. As we understand it, the case made against him is twofold. In the first place it is said that the implements of housebreaking which were found in the car were in his possession as well as in the possession of Byast. There was, however, a distinction between the facts proved in the case of Byast and those proved in the case of Lester. Whatever suspicions may be entertained—and certainly strong suspicions can be entertained—the only evidence is that Lester was a passenger in the car belonging to and driven by Byast, in the cubbyhole of which were two pairs of gloves and a piece of celluloid, and in the boot of which were other housebreaking implements. In our view the *mere* fact that a man is a passenger in a car which contains housebreaking implements is not sufficient to show that he is in possession of them, whatever may be the case as regards the owner and driver of the car.

The alternative ground on which it is suggested that Lester should have been found guilty is that he was a participant with Byast in a housebreaking expedition, and that in such a case, where one of the participants is found in possession of housebreaking implements, his possession can be attributed in law to the other participant also, the authority for that proposition being THOMPSON (*supra*). We do not doubt that, if a common participation in a housebreaking expedition had been established by the evidence, the principle of THOMPSON (*supra*) would apply and the conviction of Lester would be upheld on

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that ground. The difficulty which we all feel in this case is that, however suspicious the circumstances may be—and we do not by any means overlook the various matters to which Mr. Buzzard has drawn our attention—there is still, at the end of it all, a lack of evidence, as distinct from suspicion, that the common enterprise in which Lester was engaged with Byast was an enterprise of housebreaking. It may very well have been, but we can see no evidence to establish that it was.

For these reasons, in our opinion, the conviction in the case of Lester must be quashed, while the conviction and sentence in the case of Byast must be upheld. I have made it plain that we are concerned only with the conviction and sentence for possessing housebreaking implements by night. There was no appeal as regards the offence of larceny, to which the appellants pleaded Guilty and the certificate granting leave to appeal did not cover that.

One appeal dismissed.
One conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE GLYN-JONES

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STRATH *v.* FOXON

Brothel—Premises Divided into Two Flats—Separate Lettings—Common Front Door—Joint Use of Kitchen Only—Each Flat Used by one Woman for Prostitution—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 13 (3)—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 4.

The respondent, as agent for the lessor, let a flat comprised in the first and second floors of premises containing three floors

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to a woman whom she knew intended to use the flat for purposes of prostitution. She also let a flat comprised in the third floor to another woman whom she knew intended to make a similar use of it. Access to the entire premises was obtained by one door from the street, and there was a common staircase, on which a substantial door fitted with a Yale lock divided the whole of the third floor from the lower ones, rendering it completely self-contained. A kitchen on the second floor was shared by the tenants, but, apart from this, there was no common user of the premises. The respondent was charged that she, being the agent of the lessor or landlord of the entire premises, let the same with knowledge that they were to be used as a brothel, contrary to section 13 (3) of the Criminal Law Amendment Act, 1885, and section 4 of the Criminal Law Amendment Act, 1912. The magistrate, being of opinion that there were separate lettings of the flats and no common user, held that the premises could not in law constitute a brothel and dismissed the information.

Held, that it being well settled that use of premises by one woman only could not constitute them a brothel, and there being evidence to support the magistrate's finding that there were separate lettings and no common user, the Divisional Court would not interfere with his decision.

SINGLETON *v.* ELLISON [1895] 1 Q.B. 607 followed.

Case stated by a metropolitan magistrate.

At Bow Street Magistrate's Court an information was preferred by the appellant Strath, a police officer, charging the respondent, Dorothy Foxon, that she, being the agent of the lessor or landlord of premises comprising the first, second and third floors of 45 Curzon Street, W.1, let the same on or about the 27th day of September, 1954, with the knowledge that the said premises were to be used as a brothel, contrary to section 13 (3) of the Criminal Law Amendment Act, 1885, and section 4 of the Criminal Law Amendment Act, 1912.

The learned magistrate heard the evidence for the prosecution on the information on the 11th and 23rd days of March, 1955, and at the close of the case for the prosecution found the following facts to be prima facie established:—

(a) that since July 17, 1954, the lease of the upper part of 45 Curzon Street, W.1 (hereinafter called " the said premises ")

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has been vested in one Helen Norah Tracy (hereinafter called "Miss Tracy").

(b) That the said premises consist of the first, second and third floors to which access is obtained by the same street door from Curzon Street, and which are reached by the same staircase on which a substantial door fitted with a Yale lock divides the whole of the third floor from the lower ones, and the third floor is therefore completely self-contained.

(c) That the first and second floors comprise a sitting room, bedroom, bathroom and kitchen, while the third floor consists of a bedroom and another room which was indeterminately furnished and a bathroom.

(d) That at all times material to this case the respondent was employed as a negotiator by a firm of estate agents carrying on business under the style of Blake & Partners at Queen Street, W.1, and that at all such times she was authorised by Miss Tracy to act through Blake & Co., as agent in the letting of the said premises.

(e) That on September 27, 1954, the respondent, acting as aforesaid, met by independent appointment, but at the same time, one Frances Curtis (hereinafter called "Mrs. Curtis") and one Anne Bussutil (hereinafter called "Mrs. Bussutil") at a café in Shepherd Market, W.1, and that as a result of a discussion which then took place between the respondent and Mrs. Curtis and Mrs. Bussutil the respondent as agent for Miss Tracy let the first and second floors of the said premises to Mrs. Curtis at a furnished rental of £25 per week and (as a separate letting) the third floor (with the use of the kitchen on the second floor) to Mrs. Bussutil at a furnished rental of £25 per week. Each tenant received a key to the street door and Mrs. Bussutil received a key for the door to the third floor.

(f) That at the time of the said lettings the respondent knew both Mrs. Curtis and Mrs. Bussutil to be prostitutes and that each of them proposed and intended to use her own flat for the purposes of prostitution. Save for the kitchen, there was no intention of a common user or a user by any person other than the respective tenants. It appeared that both Mrs. Curtis and

Mrs. Bussutil used the kitchen for normal purposes and that there were two cupboards in the kitchen containing crockery and kitchen utensils. From the contents of the cupboards it appeared that one cupboard contained articles belonging to Mrs. Curtis and the other cupboard articles belonging to Mrs. Bussutil.

(g) That Mrs. Curtis and Mrs. Bussutil went into occupation under their said respective tenancies on September 29, 1954, and that thereafter and in particular on the 18th, 19th and 20th days of October, 1954, when observation was kept by police officers, both Mrs. Curtis and Mrs. Bussutil took a number of men into the said premises for the purpose of prostitution.

(h) That for such purposes the first and second floors were used exclusively by Mrs. Curtis and the third floor only by Mrs. Bussutil.

The learned magistrate found these facts after hearing the evidence for the prosecution and making a personal examination of the premises. He came to the opinion that, since there were separate lettings and no common user, the said premises could not in law constitute a brothel and dismissed the information without hearing evidence for the defence.

The prosecutor appealed.

Sebag Shaw, for the appellant.

Fenton Bresler, for the respondent.

Cur. adv. vult.

October 28. The judgment of the court was read by:

ORMEROD J. [after stating the facts as set out above]: Section 13 of the Criminal Law Amendment Act, 1885, provides (*inter alia*): "Any person who . . . (3) being the landlord or lessor of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel" shall on summary conviction be liable to penalties as provided by the section.

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The question of what is a brothel under the section first came up for consideration by this court in SINGLETON *v.* ELLISON [1895] 1 Q.B. 607. In that case a woman occupied a house frequented day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for the purpose of prostitution. It was held that she had not committed the offence of " keeping a brothel " within the meaning of section 13 (1) of the Act. Wills J., in a short judgment, said at p. 608 : " A brothel is the same thing as a ' bawdy-house '—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by magistrates in this case, where one woman receives a number of men."

The question was further discussed in DUROSE *v.* WILSON (1907) 71 J.P. 263, a case where twelve of a block of eighteen flats were let to known prostitutes. There was no evidence to show which flat was occupied by which woman. The porter in charge of the flats knew the purpose for which the women were using them, and after midnight when the street door was closed, it was his practice to unlock the door to admit the women and the men they had brought with them. The magistrate found that the building as a whole constituted one set of premises, and the building as a whole was used as a brothel. This court upheld the magistrate's decision on the magistrate's findings of fact, and because of these findings was able to distinguish the case from that of SINGLETON *v.* ELLISON (*supra*). It was further held in CALDWELL *v.* LEECH (1913) 109 L.T. 188, that, as only one woman was using the premises in question for the purposes of prostitution, the premises were not a brothel.

In view of these authorities it is clear that premises cannot be regarded as a brothel if they are used by one woman only. The only question, therefore, is whether the two flats in question were separate premises. Each of these cases must depend

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on its own facts, and it might well be that in some cases the evidence would be such that the court would find that the arrangements made were a subterfuge to avoid the consequences of section 13.

In this case, however, the learned magistrate, after hearing the evidence and making a personal inspection of the premises, has found that there were separate lettings of the two flats and no common user other than a joint user of the kitchen. There was evidence to justify his findings, and this court cannot therefore interfere with his decision. In our opinion this appeal should be dismissed.

Appeal dismissed.

Solicitors: Allen & Son, for the appellant; Bernard Samuel, Berrick & Co., for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE BARRY

SANDLAND *v.* NEALE

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Road Traffic—Dangerous Driving—Notice of Intended Prosecution—Validity—Defendant Unconscious and in Hospital during Statutory Period—Notice Sent by Registered Post to Defendant's Home Address—Proper Inquiries by Police—Defendant's Wife Living at House—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 11, 21 (*c*).

The defendant was very seriously injured in a motor accident on January 23, 1955. He could not be warned at the time that the question of his being prosecuted would be considered. A police officer visited the hospital to which the defendant had been removed on the day of the accident and again on February 2, but on neither occasion was he able to converse

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with the defendant, and the police officer expected the defendant to be detained there for a considerable time. The officer, after making inquiries, ascertained that the defendant's wife was living at the defendant's usual residence, and on February 2 a notice which complied with the terms of the Act was sent by registered post to that address. The notice was received by the defendant's wife on February 3, but she did not give it to the defendant till after the expiration of 14 days from the date of the accident.

Held, (Barry J. dissenting) that, the sending and not the receipt of the notice being the decisive factor, the duty imposed on the prosecution by section 21 of the Road Traffic Act, 1930, was fulfilled if the notice was sent to the alleged offender wherever it was most likely that it would come to his attention within the specified time; that in the present case the police were justified, having made proper inquiries, in addressing the notice to the defendant's home; and that the notice was, accordingly, valid.

HOLT *v.* DYSON [1951] 1 K.B. 364 distinguished.

Case stated by Wallasey justices.

At Wallasey magistrates' court an information was preferred by the appellant Sandland, a police officer, charging the respondent, Alexander Neale, with dangerous driving, contrary to section 11 of the Road Traffic Act, 1930.

The following facts were found by the justices: The respondent had a motor accident about midnight on January 23, 1955. He was very seriously injured and could not be warned at the time that the question of his being prosecuted would be considered. A police officer twice visited the hospital to which the respondent had been removed, first on the day of the accident and again on February 2, but on neither occasion was he able to converse with the respondent because of his condition. If the notice of intended prosecution had been personally served on the respondent within the statutory period of 14 days, he would not have understood it. The police officer expected the respondent to be detained in hospital for a considerable period, and he was not in fact discharged till March 23. The police officer ascertained that the respondent's usual residence was at 145 Leasome Road, Wallasey, and that the respondent's wife was still residing there. On February 2, a

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notice, which complied with the Act, was sent by registered post to that address and was received by the respondent's wife on February 3, though she did not give it to the respondent till after the expiration of 14 days from the date of the accident.

The justices were of opinion that no notice of intended prosecution sufficient to comply with section 21 of the Act had been served on the respondent within the 14 days required by the statute and dismissed the information.

The prosecutor appealed.

Frank D. Paterson, for the appellant.
R. Gordon Clover, for the respondent.

Cur. adv. vult.

November 4. The following judgments were read.

THE LORD CHIEF JUSTICE: This case stated by the justices for the County Borough of Wallasey raises again a question as to the service of a notice of intended prosecution for a driving offence under section 21 of the Road Traffic Act, 1930. The facts are that the respondent was involved in a motor accident about midnight on January 23, 1955. He was very seriously injured and could not be warned at the time that a prosecution would be considered. On two occasions, a police officer visited the hospital to which the respondent had been removed, first later on the day of the accident and again on February 2. On neither occasion was he able to hold a conversation with the respondent because of the latter's condition. The officer thought that owing to the state in which the respondent appeared to be on this second visit it would have been improper and unwise to serve him with a notice and that the respondent would not have understood it if he had done so. We must, I think, take it that the justices were satisfied that the police officer's opinion was justified, and, as they also find that the respondent had no knowledge of the officer's visits or of any conversation with him, it is obvious that, had he served the notice on the respondent, it would have conveyed nothing to him. The notice would

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have to be sent by February 6 at latest, and the officer had obviously no reason to suppose that his condition would be substantially improved between the 2nd and the 6th. He expected the respondent would be detained in hospital for a considerable period and he was in fact not discharged till March 23.

From inquiries the officer made between the date of the accident and February 2 he had ascertained that the usual residence of the respondent was at 145 Leasome Road, Wallasey, and that his wife was then living in the house. Accordingly on February 2 he sent a notice, which, it is not disputed, complied with the Act, by registered post to that address and the letter was duly received there on February 3. The notice was not handed to the respondent till after the expiration of the 14 days, but, though there is not an express finding on the subject, it is clear from the respondent's contentions below that it was eventually handed to him by his wife. Whether or not the respondent received the notice within 14 days is immaterial; the section requires the notice to be sent within that time; it says nothing about receipt and for the obvious reason that the person to whom it is sent may be away from home when the letter is delivered. But it is said that in this case the police officer knew that the respondent was not only not living at home when the letter was sent but was actually in hospital, which was the only place, therefore, to which the letter could be sent to comply with the section, and reliance is placed on the decision of this court in HOLT *v.* DYSON [1951] 1 K.B. 364.

Before I deal with that case, there are one or two pertinent observations that may be made. The object of the section is, of course, plain; it is to let the offender know promptly that he may be prosecuted, so that he may be able to collect material for his defence while the matter is fresh in his memory and that of potential witnesses; so the sooner the notice is given, the better. But if a man is lying unconscious or even in a partially unconscious condition for the whole of the 14

days, the service on him during that period is of no practical use to him unless someone can act on his behalf and will do so. For instance, an injured man might be taken to his home, but if the only occupant of his house is a housekeeper, it is unlikely that she would open his registered letters, nor would a doctor in attendance on him during the period when he could not attend to them be likely to do so. But compliance with the Act must still be made. The Interpretation Act, 1889, provides that service by post shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document to be served, but that does not solve the question as to what is properly addressing. It is true that in STANLEY *v.* THOMAS [1939] 2 K.B. 462 Lord Hewart, Lord Chief Justice, said that he thought that all that is meant by properly addressing is confined to the accuracy and propriety of the address and not to any circumstances affecting the question whether the letter was being sent to the proper destination. I confess I have difficulty in understanding this, for it seems to me that the propriety of the address and the proper destination are the same thing. I therefore turn at once to the two cases on this subject, STANLEY *v.* THOMAS (*supra*) and HOLT *v.* DYSON (*supra*) where the former case was distinguished. In the former the driver was interviewed in hospital on September 14 within the 14 days which expired in that case on September 22. A notice had been posted to him at his usual residence on September 13 and was not returned to the police as undelivered till September 23. It was held that, although he was well enough to be interviewed on September 14, the notice sent to his home while he was still in hospital was duly sent. The court said that it was posted at a time when it might well have been expected to reach him in the ordinary course named in the statute. The Lord Chief Justice (Lord Hewart) went on to say that other considerations, no doubt, would apply if it appeared that the sender deliberately sent it to a place where he knew the intended recipient was not or was not likely to be, and from

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this and a further passage in the judgment emphasis is being laid on the fact that there must be no deliberate attempt to defeat the intention of the statute; and he said that other considerations may apply where the circumstances are different. It was because the court considered that the circumstances in HOLT *v.* DYSON (*supra*) were different that they distinguished the two cases. In the latter the injured woman lived in Worthing; the accident took place in Hove and she was in hospital at the latter place. She was interviewed in hospital seven days after the accident and was well enough to be told orally that a prosecution would be considered. Then within 14 days, namely, on November 28, a notice was sent to her house at Worthing which was not returned as undelivered till December 9 while she was still in hospital, and it was held that the notice was not properly sent. We distinguished the case from STANLEY *v.* THOMAS (*supra*), because we thought that in the latter the court considered the police might reasonably have thought the man might be back home before the time expired. In HOLT's case (*supra*) not only did they know that the woman would not be, but no inquiry was made as to whether letters would be received or if anyone was in charge at her home, and the notice was sent only three days before the time would expire.

In the present case the police had made inquiries and had ascertained that the respondent's house, which was in the borough where the accident happened, was open and that his wife was living in it. She, in fact, took in the letter. In my opinion, it is much too technical to hold in these circumstances that the notice was not sent to him within the specified time. It is the sending and not the receipt that is decisive. In ordinary parlance a letter is sent to a person if it is sent to his ordinary residence. True the police knew he was in hospital, but in a state unfit to receive or attend to a letter. What better or more reasonable thing could they do to implement the intention of the section than to send it where it would be received by his wife, who might well be supposed to be ready

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to deal with anything urgent while her husband lay unconscious? In such circumstances to put forward arguments as to whether a wife is her husband's agent to do this is to ignore reality; we are not dealing with a commercial or business matter. It was argued that there is nothing in the section which entitles the court to consider whether the police acted reasonably. I do not agree. The section requires the notice "to be sent by registered post to him." It does not say where. It does not say to the last known address, but surely no one could contend that, if it was sent to his ordinary address, the fact that he was away on a holiday would make the service bad; it is the sending not the receipt, as I have already emphasised, that is material. It was because the court thought that the police had not acted altogether reasonably in HOLT'S case (*supra*) that the service was held to be bad. Here the police have taken the course which was most likely to effect that at which the section aims. The illustration I gave in HOLT'S case (*supra*) of a resident in Cornwall meeting with an accident while staying in Northumberland, I think, shows that reasonableness must be a consideration in a matter of this sort. In my opinion, the duty is performed if the notice is sent to the alleged offender wherever it is most likely to come to his attention within the specified time. If his condition is such that wherever it is sent he will be unable to appreciate or act upon it, I do not think it can make any difference whether it is sent to the hospital where he is lying unconscious or to his home where his family are living, though the latter is the more preferable, as it is quite possible that they will take any action that may be open in his interest. I recognise that the two cases to which I have referred may cause difficulty for justices and it is no reflection on them that we are taking a view differing from them. I hope this judgment may perhaps make it easier for them in the future. In my opinion, the appeal should be allowed.

ORMEROD J.: I agree with the judgment of the Lord Chief Justice, and wish to make only one short observation. The

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section provides that notice of an intended prosecution must be served on the defendant or sent to him by registered post within fourteen days of the commission of the offence. In HOLT *v.* DYSON (*supra*) the Lord Chief Justice said that the police must act reasonably in these matters. It may be that if the police had sent the notice to the hospital where they knew the defendant was, the magistrates might properly have found that the police were complying with the section. But that does not, in my view, mean that because the police did not adopt that course, but sent the notice to his home, after making proper inquiries, that they were not acting in pursuance of the section. The two findings are not mutually exclusive, and to have taken either course in this case would, in my opinion, have been a proper compliance with the section. I agree that the case should be sent back.

BARRY J.: In this case I have the misfortune to differ from my brethren as to the proper construction of section 21 of the Road Traffic Act, 1930. I agree that the police acted in a humane and reasonable manner, and that the course which they adopted in regard to the sending of the notice was at least as likely as any other to bring it to the attention of the respondent within 14 days, if he had recovered sufficiently during that period to appreciate its contents.

The reasonableness or otherwise of the conduct of the police is, no doubt, a matter to be taken into account, but only in considering whether or not they have complied with the requirements of the Act. If the notice of intended prosecution has not been sent to the accused person in the manner prescribed by section 21 (*c*) of the Road Traffic Act, 1930, there can be no conviction. No question arises here as to the form or contents of the notice. It was properly sent by registered post and the only point at issue is whether or not it was sent to the respondent. The justices have decided that it was *not*, and I am bound to say that I agree with their decision.

Before the decision of this court in HOLT *v.* DYSON [1951] 1 K.B. 364, it might reasonably have been suggested that, in

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the absence of bad faith on the part of the sender, a notice was sent to the accused as required by the statute if it was properly addressed and posted to him at his normal place of residence. It is clear from HOLT *v.* DYSON (*supra*) that this is not the correct interpretation of the Act in cases where the police are well aware that the accused person is not living at his usual address, but at a known address, such as a hospital, elsewhere, and there is no expectation of his returning to his normal residence during the statutory 14-day period within which the notice must be sent. In such circumstances it was decided by this court that the notice must be sent to the place where the accused was known to be.

So far as I can ascertain, the only feature which distinguishes this case from HOLT *v.* DYSON (*supra*) is that here the police made proper inquiries and satisfied themselves that the respondent's wife was living at his home. In HOLT *v.* DYSON (*supra*) no effort was made to discover whether anyone was living at Miss Dyson's home and it was in fact unoccupied.

Speaking for myself, I cannot accept the view that this one difference between the two cases has in law any real significance. A wife, as I see it, is not an agent authorised to receive communications of this kind on behalf of her husband, and, in any event, the Act requires the notice to be sent to the accused and not to his agent. If the presence of his wife in the respondent's home distinguishes this case from HOLT *v.* DYSON (*supra*), what would be the position if the mother or sister of the accused person were known to live at his address? It might also be reasonable for the police to assume that such a person would be likely to give the notice to the accused as soon as he was fit to receive it. If, on the other hand, the occupant were a housekeeper or domestic servant, it might be even more reasonable to send the notice to the address of the mother or sister or even to that of his solicitor.

I fully appreciate that in the present case the point taken on the respondent's behalf is both technical and unmeritorious. None the less, with the greatest respect for the views expressed by my brethren, I fear that it may lead to confusion if the

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principle established by DYSON's case (*supra*) is qualified by the consideration of what may or may not be reasonable in any particular case. For myself, I would prefer to establish the simple rule that the notice must be sent to the accused person at the address at which he is actually living, and will in all probability continue to live, during the statutory 14-day period, if that address is actually known to the police. Unless the accused is in hospital or is known to be living at some address other than his own, the notice would normally be sent to his usual residence. Provided that the notice is properly sent, the requirements of the Act have been observed, and the failure of the accused to receive it will not be a bar to prosecution.

Case remitted to justices.

Solicitors: Kinch & Richardson, agents for Percy Hughes & Roberts, Birkenhead, for the appellants; Carpenters, for Laces & Co., Liverpool, for the respondent.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PEARCE AND MR. JUSTICE PEARSON

1955
Nov. 7

ADRIAN ANDREW BRODIE HARRIS-RIVETT

Court-Martial—Jurisdiction—Offence by Officer Abroad—Arrest in England—Investigation of Charge by Commanding Officer Abroad—Army Act, ss. 45 (1) (5), 46.

Court-Martial—Evidence—Questions Put to Accused in Custody — Judges' Rules — How far Applicable to Courts-Martial.

The appellant, an officer stationed in England, was arrested in England on a charge of attempting to procure the commission of an act of gross indecency by a civilian in Berlin. He

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was taken to Germany and the commanding officer of a regiment to which he was there attached investigated the charge and decided that there was a case to be tried by court-martial. The appellant was convicted before a general court-martial held in Berlin on an alternative charge of scandalous conduct of an indecent kind, contrary to section 18 (5) of the Army Act. He appealed on the grounds: (a) that the court-martial had no jurisdiction to try him because the investigation had not been made by his own commanding officer in England and (b) that the Judges' Rules had not been complied with, because he had been ordered after his arrest to attend an interview with an officer of the military police and had there been questioned.

Held, (i) that sections 45 and 46 of the Army Act did not require that the appellant's commanding officer at the time of the arrest should be the commanding officer who investigated the charge or took steps to bring the appellant to trial; that the commanding officer who in fact investigated the charge was the appropriate commanding officer to take steps to bring the appellant before the court-martial; and that, accordingly, the court-martial had jurisdiction to try the appellant.

(ii) that although, generally speaking, the rules of evidence in civil cases apply to courts-martial, the Judges' Rules do not apply, though it may be a matter for the Army Council at some future time to consider whether they should be applied to courts-martial, either as they stand or subject to qualifications. In any event, the appellant's statement at the interview was admissible in evidence, and the Judge Advocate had properly directed the court on the matter. The conviction, therefore, must be affirmed.

Semble, the absence of investigation of a charge by any commanding officer of the accused might invalidate a conviction by court-martial.

Appeal against conviction.

The appellant, Lt.-Col. Adrian Andrew Brodie Harris-Rivett, D.S.O., Bedfordshire & Hertfordshire Regiment, was convicted before a general court-martial in Berlin on May 30, 1955, of scandalous conduct of an indecent kind, contrary to section 18 (5) of the Army Act, relating to indecent behaviour with a civilian in Berlin in Dec. 1954. He was attached to a school of instruction of officers at Warminster, and while there was on Jan. 23, 1955 arrested by an officer of equal rank on a charge of attempting to procure the commission of an act of

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gross indecency. He demanded that the charge should be investigated by his commanding officer at Warminster, but he was taken to Germany, where he was attached to the 1st Battalion Manchester Regiment. The commanding officer of that regiment investigated the charge and decided that there was a case to be tried by court-martial.

The appellant appealed on the grounds (i) that the court-martial had acted without jurisdiction, in that the charge should have been investigated by the appellant's commanding officer at Warminster; (ii) that the Judges' Rules had not been complied with, in that while in custody the appellant had been ordered to attend an interview with an officer of the military police and had there been questioned.

B. R. Clapham, for the appellant.
E. Garth Moore, for the Crown.

THE LORD CHIEF JUSTICE: The appellant in this case was convicted before a general court-martial sitting in Berlin of an offence of an indecent character with a civilian in Berlin. He took objection before the court-martial by way of a plea as to jurisdiction on the ground that certain requirements of the Army Act and the Rules of Procedure made under the Army Act had not been complied with, which, he said, destroyed the jurisdiction of the court. The court overruled the objection and convicted him on one of the charges and sentenced him to be cashiered. With the sentence this court has nothing to do.

The only substantial ground of appeal which is put forward here is that a Rule of Procedure or a right of the appellant under the Army Act as an army officer of having the matter investigated by his commanding officer before the court-martial was convened was not afforded to him. In the opinion of the court, this appeal entirely fails and the point, which is highly technical in any circumstances, and certainly in this case, has no substance.

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The facts were these: the appellant had been in Berlin. Exactly what he had been doing in Berlin or what his duties were in Berlin we have not inquired, but it was during the time when he was as an officer in Berlin that the offence of an indecent character with a civilian was alleged to have taken place. He returned to England, and when he came back to England, being an officer of the Bedfordshire and Hertfordshire Regiment, was sent to Warminster, and was attached there to a School of Instruction for Officers. While he was there, owing to statements which, I suppose, had been made to the provost authorities in Berlin, he was arrested. He was arrested by an officer of equal rank, Lt.-Col. Elliott, on this charge of indecency. He demanded that the charge should be investigated by the commanding officer at Warminster, though it is perfectly obvious that it would be most absurd if the commanding officer at Warminster was obliged to investigate the serious matter of an offence committed in Germany against a civilian in Germany. What sort of investigation could have taken place? It is perfectly clear that the only investigation that could have taken place under those circumstances in England would have been of a most jejune description. If the contention here were right, as I pointed out in the argument, if an offence was alleged to have been committed by a soldier against a civilian in Hong Kong or Malaya or some other far-distant possession of the Queen, he could demand that the matter should be investigated by his commanding officer when he returned to England, that is to say, by an officer who might never have seen him before or might have no opportunity of finding out anything that had taken place in the foreign place where the offence had been committed, except possibly by keeping the officer under arrest till statements could have been obtained from abroad; it would be a very grave prejudice to any officer or soldier if this court had to give any colour or support to such a contention.

We must now turn to the Act. Section 45 provides: "The following regulations shall be enacted with respect to persons

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subject to military law when charged with offences punishable under this Act:—(1) Every person subject to military law when so charged may be taken into military custody." The charge is made just in the same way as a charge is made with regard to a civilian by the policeman who takes him into custody. He is taken into custody. Then, by subsection (5): "The charge made against every person taken into military custody shall without unnecessary delay be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody."

Then section 46 (1) provides: "The commanding officer shall, upon an investigation being had of a charge made against a person subject to military law under his command of having committed an offence under this Act, dismiss the charge, if he in his discretion thinks that it ought not to be proceeded with, but where he thinks the charge ought to be proceeded with, he may take steps for bringing the offender to court-martial, or, in the case of an officer below the rank of lieutenant-colonel or of a warrant officer, may refer the case to be dealt with summarily under the provisions of this Act. . . ." No one suggests that an offence of this description should be dealt with summarily. It must be investigated by a court-martial; but the section does not say what commanding officer, and an officer may be serving under a variety of commanding officers up to the time when he leaves the service. In this case, he was taken into military custody and taken by the officer in whose custody he properly was to Germany, having before he left demanded an investigation by his commanding officer. The commanding officer in England could not and did not investigate this case, but the appellant was then taken to Germany where he was attached to the First Battalion of the Manchester Regiment. He was attached there so that the commanding officer of a regiment in Germany where the court-martial would have to be held could investigate the charge; and the commanding officer did investigate it, and decided that there was a case to be tried by court-martial. Thereupon,

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the Major-General commanding that part of Germany, who was the proper person to act as convening officer, convened a court-martial, and the court-martial found before them the charge sheet, which said: "The accused, Substantive Major, Temporary Lieutenant-Colonel, Adrian Andrew Brodie Harris-Rivett, the Bedfordshire and Hertfordshire Regiment, attached to the 1st Battalion Manchester Regiment, an officer of the Regular Forces, is charged with the following offences"; and that was signed by the Lieutenant-Colonel commanding the 1st Battalion Manchester Regiment. Those charges having been sent to the General, he ordered that the appellant was to be tried by court-martial. If no commanding officer had investigated these charges, though we are not deciding the point, that might have affected the jurisdiction of the court-martial. In another case where the facts were different, we might have to decide whether failure of a commanding officer to investigate invalidated the proceedings if a court-martial sits.

In this case it is quite clear that the commanding officer who investigated the case and held the inquiry decided that there should be a court-martial, and section 46 (1), which I have already read, provides: "The commanding officer shall, upon an investigation being had of a charge made against a person subject to military law under his command . . . dismiss the charge or . . . he may take steps for bringing the offender to court-martial. . . ." That must be the commanding officer who holds the investigation. The investigation was held, and it was held by the taking of a summary of evidence. Then, having taken the summary of evidence, the investigating officer decided that there was a case to be tried by court-martial and, accordingly, to use a civilian expression, the appellant was committed for trial by court-martial. It is quite clear that the commanding officer at the moment of arrest may not be the commanding officer to carry out the investigation. The question here is: who was the commanding officer who carried out the investigation? The commanding officer was the officer of the regiment to which the appellant had been

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temporarily attached and, in the opinion of the court, no question arises here as to jurisdiction, and this appeal is dismissed.

Perhaps I had better deal with one other point put forward by Mr. Clapham. He contended that the Judges' Rules had not been complied with in this case in that certain questions had been put to the appellant when he was in custody. The circumstances with regard to that were these: He had been ordered to present himself at Lansdowne House, in London, there to be interviewed by the officer of the Military Police, Colonel Elliott. He was not then in custody in the sense that a charge had been made against him, and he had not been taken into custody in the formal sense, though, being an officer bound to obey an order, he attended that interview in consequence of an order. Once he had been given that order, it seems to me it is extremely likely that it would have been a breach of discipline if, when Colonel Elliott came in and began to ask questions, he had taken himself out of the room. He was there, perhaps not formally in custody, but in circumstances which the Judge Advocate described as militarily in custody; at any rate, he was there in pursuance of an order. He was asked to answer certain questions, and it is said that they amounted to cross-examination. I do not think they did, but it is not necessary for the court to give a considered decision on that point. The rules of evidence that apply in civil cases apply, generally speaking, in courts-martial, and the rule of law with regard to confessions or statements made by accused persons is that they are admissible provided they are made voluntarily. It is perfectly true that the judges did by resolution some years ago lay down for the guidance of police officers certain rules, which are now known as the Judges' Rules, with regard to giving cautions, and so forth. It is a matter for the Army Council to decide whether those Rules are to be applied as rules to courts-martial. I do not think that the Rules which the judges made to be observed in the trial of civilian prisoners can necessarily apply to serving officers and men. No doubt courts-martial have to decide the question of law in the same

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way as it has to be decided in civil cases, that is to say, whether or not the statement is voluntary. If it is a voluntary statement, it can be admitted whether the Judges' Rules have been complied with or not. The most the courts have ever decided is this, that if the judge in a civil court comes to the conclusion that the Judges' Rules have not been complied with, he may, in his discretion, refuse to admit the evidence, notwithstanding the fact that the statement is voluntary. It is entirely a matter of discretion. If a man in custody has made a statement, voluntarily and not in consequence of any threat or promise of reward or benefit, nevertheless if no caution has been given after he has been in custody, the court may refuse to admit the statement. One difficulty in applying these Rules to military personnel is that they are under discipline and at the time when an offence is investigated they are still members of a disciplined force and obliged to obey orders of superior officers. In this particular case, the appellant had been ordered to attend the interview with Colonel Elliott, and no such thing as that applies in civilian life. At some time the Judges' Rules may be applied by the Queen's Regulations to proceedings before courts-martial, either as they stand or with certain qualifications. I can quite well see that there may be occasions on which the Judges' Rules could not well be applied without some qualification to offences or charges which have been made against members of disciplined forces who are obliged to obey orders. But, in any case, there is no ground for interfering with the result of the court-martial here because we do not think the evidence was wrongly admitted and, in any case, the court-martial were properly directed by the Judge Advocate. The court had to consider whether the statement was a voluntary statement, and they came to the conclusion, having heard the evidence, that it was; and, therefore, there is no reason to interfere. On both these grounds the appeal is dismissed.

Appeal dismissed.

Solicitors: Eland, Hose, Pattison, Nettleship & Butt, for the appellant.

[IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

LORD TUCKER, LORD SOMERVELL OF HARROW AND MR. L. M. D. DE SILVA

1955
July 26, 27;
Oct. 19

ALADESURU AND OTHERS *v.* R.

Grounds of Appeal—Judgment "against the Weight of the Evidence"—Not Known to English Law.

There is no ground of appeal known to English law in a criminal appeal that the verdict or judgment "is against the weight of the evidence."

Appeals against conviction.

The appellants, Samuel Aladesuru and others, were convicted in the Supreme Court of Nigeria on May 11, 1953, on two counts charging them, respectively, with having as directors of the Standard Bank of Nigeria, Ltd., knowingly made a balance sheet of the bank as at March 31, 1952, showing certain false particulars, and with having knowingly published the same, contrary to section 436 (*a*) of the Criminal Code of Nigeria, and were each sentenced to five years' imprisonment with hard labour. They applied for leave to appeal to the West African Court of Appeal on a number of grounds, certain of which were struck out by that court, including ground No. 1, that "the judgment is against the weight of the evidence." On July 29, 1953, the West African Court of Appeal refused the applications. The appellants were granted special leave to appeal to the Judicial Committee of the Privy Council by Order in Council, dated April 19, 1954. The main ground of appeal was that the West African Court of Appeal had struck out certain grounds including ground No. 1 in the notice of application for leave to appeal without hearing argument thereon and had thereby deprived the appellants of a right of appeal granted to them by statute, whereby justice had been denied them.

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Section 11 (1) of the West African Court of Appeal Ordinance follows the language of section 4 (1) of the Criminal Appeal Act, 1907, which provides: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or to the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Christopher N. Shawcross, Q.C. and *David Kemp* for the appellants.

J. G. Le Quesne for the Crown:

At the conclusion of the arguments on July 27, 1955, Lord Tucker said that their Lordships would humbly advise Her Majesty that the appeals should be dismissed and that they would give their reasons later.

October 19.—The judgment of the Board was read by

LORD TUCKER [after stating the facts]: It will be observed that the language of the West African Court of Appeal Ordinance follows that of the English Criminal Appeal Act, 1907, under which it has long been established that the appeal is not by way of a re-hearing as in civil appeals from a judge sitting alone, but is a limited appeal which precludes the court from reviewing the evidence and making its own valuation thereof. The position is correctly stated at p. 346 of Archbold's *Criminal Pleading, Evidence and Practice*, 33rd ed. as follows: "In order to succeed the appellant must show, in the words of the statute . . . , that the verdict is unreasonable or cannot be supported

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having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence." It is also to be observed that an appeal on this ground does not lie as of right, but only by leave of the court.

On the present appeal before the Board no attempt was made to establish that this case was one of the exceptional cases, a few of which have arisen from time to time in England, in which a criminal verdict has been set aside as one which no reasonable tribunal could have found. The complaint is that the Court of Appeal were wrong in ruling out ground No. 1 as incompetent, or, in the alternative that, if not stated with strict accuracy, it was a denial of justice to reject this ground merely because it bore " a wrong label."

A number of cases, most of them from the early English Criminal Appeal Reports, were cited by counsel for the appellants, in the headnotes of which the phrase " against the weight of the evidence " occurred with reference to applications to the Court of Criminal Appeal. It was submitted that the phrase had thus been treated as synonymous with " unreasonable or which cannot be supported having regard to the evidence." There can be no doubt that this phrase is inaccurate and is one which cannot properly be substituted for the words of the statute, although it has in one or two cases found its way into the judgments, though always with qualifying language. It should by now be appreciated that the Nigerian Ordinance gives no appeal on such ground, but that does not mean that in a proper case the Court of Appeal will not give leave to appeal or review the evidence if a prima facie case were shown that the verdict appealed from is one at which no reasonable tribunal could have arrived.

We do not sit as a Court of Criminal Appeal and it certainly has not been established in the present case that the West African Court of Criminal Appeal acted in a manner which would warrant our intervention by way of advice to Her Majesty on the ground of any fundamental defect in the administration of criminal justice.

[His Lordship then dealt with a second ground of appeal, to which it is not necessary to refer for the purposes of this report, and concluded]: For these reasons their Lordships have advised Her Majesty that these appeals should be dismissed.

Appeals dismissed.

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Solicitors: Rexworthy, Bonser & Wadkin, for the appellants; Charles Russell & Co., for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PEARCE AND MR. JUSTICE PEARSON

WALTER KARL GOODING

1955
Oct. 31

Sentence — Probation Order — Further Offence during Probation Period—Order for Detention in Detention Centre—Subsequent Sentence of Borstal Training for Original Offence not Appropriate.

In October, 1954, the appellant was placed on probation at quarter sessions for 2 years in respect of offences of housebreaking and shopbreaking. In June, 1955, he committed an offence of larceny and was sentenced for this by a magistrates' court to three months' detention in a detention centre. In October, 1955, he was brought back to quarter sessions in respect of the offences for which he had been placed on probation and was sentenced to Borstal training.

Held, that the sentence of Borstal training should be quashed, as it was not appropriate that such a sentence should be passed on a youth who had just been released from a detention centre in respect of offences committed before the offence for which he was sent to the detention centre.

Appeal against sentence.

On October 27, 1954, the appellant pleaded Guilty at Essex Quarter Sessions to housebreaking and shopbreaking and was placed on probation for 2 years. In June, 1955, he committed

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WALTER KARL GOODING

Goddard L.C.J., Pearce J., Pearson J.

an offence of larceny, and in respect of this he was ordered by Stretford Magistrates' Court on July 12, 1955, to be detained in a detention centre for 3 months. On October 26, 1955, he was brought back to Essex Quarter Sessions in respect of his breach of probation, and was sentenced to Borstal training in respect of the original offences.

No counsel appeared.

THE LORD CHIEF JUSTICE: This is a case which has given the court some anxiety. The history is this: in October, 1954, the appellant pleaded Guilty at Essex Quarter Sessions to housebreaking and shopbreaking, and the court made a probation order for two years and also took a recognisance from his father for the appellant's good behaviour. In June, 1955, the appellant broke his probation undertaking, because he robbed a gas meter at his home, so that his father became liable to have his recognisance estreated, and it was in fact estreated to the extent of £2. For this offence the appellant was brought before the Stretford magistrates, who on July 12, 1955, very properly ordered him to be sent to a detention centre for three months. That is a very good way in which to deal with youths of this kind, because the discipline at detention centres is very strict. Young offenders who are sent there are kept, I believe, at the double the whole time, and we find that most of them dislike detention centres very much. Having been released from the detention centre, the appellant was brought back to Essex Quarter Sessions in October, 1955, in respect of the breach of his probation, and was there sentenced to Borstal training for the original offences.

This court cannot consider that it is right unless in a most exceptional case—and I cannot imagine one—that a sentence of Borstal training should be passed on a young offender who has just come out of a detention centre if the offence for which he is being sent to Borstal was committed before the offence for which he was sent to the detention centre. I agree it is not an easy position, but the appellant has had three months in a

detention centre for the offence which he committed after he had been put on probation. Therefore, in all the circumstances, the court thinks that it ought to set aside the sentence of Borstal training and release the appellant.

Sentence quashed.

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WALTER KARL GOODING

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CIRCUIT CASE (WESTERN CIRCUIT)

BEFORE

MR. JUSTICE FINNEMORE

R. *v.* SPICER

1955
Oct. 13

Abortion—Using Means with Intent to Procure Miscarriage—Impossibility of Effecting Miscarriage by Means Used—Offences Against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 58.

The prisoner was indicted for using means, namely, manual manipulation, with intent to procure miscarriage, contrary to section 58 of the Offences against the Person Act, 1861. He was asked by a woman who was two or three months advanced in pregnancy to help her, and inserted two fingers in her vagina, touching the womb and then told her that he thought he had "turned it." Ten days later the woman suffered a miscarriage. Expert evidence was given to the effect that the acts of the prisoner had not caused the miscarriage and that such acts could not cause a miscarriage at that stage of pregnancy. The prisoner gave evidence admitting the acts which, he said, were not intended to procure a miscarriage, but had been done to give the woman confidence and satisfy his own curiosity.

Held, that if the acts were done by the prisoner with the intention of procuring a miscarriage he was guilty of the offence charged, and that it was immaterial whether the method adopted could or could not procure a miscarriage.

Trial at Assizes.

The prisoner was indicted at Dorset Assizes on October 13, 1955, before Finnemore J. for using means with intent to procure miscarriage contrary to section 58 of the Offences against

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the Person Act, 1861. The Particulars of Offence alleged that on April 30, 1955, in the county of Dorset, he, with intent to procure the miscarriage of N., "did unlawfully use manual manipulation. . . ." He pleaded Not Guilty.

The prisoner, who was a secondhand clothes dealer, was asked by N., who was two or three months advanced in pregnancy, if he could help her out of "a spot of trouble." He said that he would see what he could do. N. visited him in his shop and he inserted two fingers into her vagina, touching the womb, and then told her that he thought he had "turned it." Ten days later N. suffered a miscarriage. Expert evidence was called to show that the acts of the prisoner did not cause the miscarriage, and that such acts could not cause a miscarriage at that stage of a pregnancy. The prisoner gave evidence admitting the acts, but denying that they were intended to procure the miscarriage of N. and saying that he had done them "to give her confidence" and "to satisfy my own curiosity."

T. R. Crawford for the Crown.
H. E. L. McCreery for the prisoner.

FINNEMORE J., in the course of his summing-up, said: Whether this act does or does not produce a miscarriage does not matter. Whether it was a method which could or could not produce a miscarriage does not matter. The question is, what did he intend to do when he did the acts which were admitted by him in the witness box?

The jury convicted the prisoner, who was sentenced to six months' imprisonment.

Solicitors: Charles Lester & Russell, Bournemouth, for the prisoner.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

MARY RACHEL RICHARDS

1955
Dec. 12

Sentence — Disparity between Sentence of Applicant and that Passed on Co-prisoner.

Sentence reduced in the circumstances of the particular case in view of the disparity between it and that passed on a co-prisoner convicted of more offences.

Application for leave to appeal against sentence.

The applicant was convicted at Cornwall Quarter Sessions on October 19, 1955, of obtaining money by false pretences and was sentenced by the Deputy Chairman to 4 years' imprisonment.

The applicant was indicted together with her mother, who was also convicted of the same and additional offences of false pretences, and was sentenced to 2 years' imprisonment.

Derek Curtis-Bennett, Q.C., and *Cyril Williams* for the applicant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE. The applicant and her mother, who were gipsies, took round carpets and similar articles of a very ordinary description and, finding a credulous old lady, represented to her that they were Persian rugs of great value and obtained from her £1,500 for goods which were worth very much less. The mother was actually convicted on more counts than the daughter, but for some reason Quarter Sessions sentenced the mother to 2 years' imprisonment only and the daughter to 4 years' imprisonment. In the opinion of the court the sentence passed on the mother was quite inadequate, but she has been well advised not to appeal, and we cannot, therefore, deal with her sentence.

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The fact that one of two prisoners jointly indicted has received too short a sentence is not a ground on which this court necessarily interferes with a longer sentence passed on the other; what has to be shown is that the prisoner appealing has received too long a sentence. If both these women had been sentenced to 4 years' imprisonment, we probably should not have interfered; but there is a very considerable disparity between the sentences, the daughter having received just twice as much as the mother. Although we think that the applicant did deserve the sentence passed on her, the disparity is one which in our opinion this court ought to take into account. We therefore formally give leave to appeal and treat this application as the hearing of the appeal. We reduce the sentence passed on the applicant by one year, so that her sentence will be altered to one of 3 years' imprisonment and, as she obtained leave to appeal, the sentence will date from conviction.

Sentence reduced.

Solicitors: Frank & Coffin, Truro, for the applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

1955
Dec. 12

EDWARD FRENCH

Sentence—Attempted Suicide.

Observations on sentence for attempted suicide.

Application for leave to appeal against sentence.

The applicant pleaded Guilty at Stoke-on-Trent Magistrates' Court to larceny and attempted suicide. He was committed for sentence under section 29 of the Magistrates' Courts Act, 1952, to Stoke-on-Trent Quarter Sessions, where on October 24, 1955,

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he was sentenced by the Recorder (E. Ryder Richardson, Esq., Q.C.) to a term of 2 years' imprisonment in respect of each offence, the sentences to run consecutively.

No counsel appeared.

THE LORD CHIEF JUSTICE. The court thinks that, in fairness to the applicant, we must read his notice of appeal as applying only to the sentence for attempted suicide. I am not surprised that he desires to appeal against that sentence, because I have never heard of a sentence of 2 years' imprisonment for attempted suicide.

The circumstances of the case are that the applicant, who is obviously a man of somewhat unstable disposition, stole a spare wheel and tyre from a van, and he was trundling it away when a constable, who had seen him do it, arrested him. That night he smashed his cell window and cut his neck on both sides with the glass and then called the gaoler. There seems to have been some doubt whether it really was a serious attempt or not, but the doctor thought it might be a genuine attempt at suicide and not a mere piece of exhibitionism. However that may be, as the applicant was a man of 36 years of age with 41 convictions for different offences, the majority of them various forms of drunkenness, the magistrates very properly committed him for sentence to the Recorder. He was represented, I suppose, under a defence certificate, and when the probation officer was giving evidence, some questions were asked about the applicant's general character and whether this was really a serious attempt at suicide. The learned Recorder intervened and said: "May I be allowed to put the problem as it presents itself to me? Self-murder is one of the most serious crimes on our calendar. An attempt thereat, therefore, is a very serious crime indeed. I was minded to regard this as a frivolous attempt and I should have treated it as such notwithstanding, but by your evidence you have proved to my satisfaction it was a serious, sane attempt on the part of this man to take his life. How can I take that lightly?"

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It would not be right for this court to say that a court should treat attempted suicide as a trivial thing. One knows quite well that unbalanced people do attempt suicide, but this is the first time I have ever heard suicide described as one of the most serious crimes known to the law, and therefore attempted suicide as a very serious offence. I have always understood—and it would be a good thing if history were examined occasionally—that suicide was originally regarded by the Ecclesiastical Courts as a crime, and that it was made a crime at common law to enable the Crown to obtain forfeiture of the suicide's goods. Any person who committed suicide was supposed to have committed the offence of murder and in the old days the Crown could then step in and claim that his goods were forfeited, which was a source of revenue to the Crown. No doubt, attempted suicide has always been regarded as an offence, but to say that it is to be regarded as a very serious crime indeed shows an entire lack of proportion. It is not a very serious crime in point of law. Whether it is regarded as a sin or not is not a matter for the court. In such cases a short sentence is often given to protect the man against himself. A very great change has come about in this matter since I was first called to the Bar. I remember that, when I was a young man going the Western Circuit, prosecutions for attempted suicide were very common at quarter sessions. Now they are rare, and magistrates generally deal with the matter. At any rate, it is absurd to say that a sentence of 2 years' imprisonment ought to be passed.

The difficulty here is this. The learned Recorder evidently intended that a sentence of 4 years' imprisonment should be passed on the applicant, and, as the applicant is a nuisance to the public, I dare say a sentence of 4 years was justified. What he did, however, was to pass a sentence of 2 years' imprisonment for the larceny and 2 years' for the attempted suicide, the sentences to run consecutively. We cannot possibly allow that to stand, and we cannot interfere with the sentence of 2 years' for the larceny because the applicant has been wise

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enough not to appeal against that. The only sentence with which we can deal is that of 2 years' for attempted suicide, and for that we substitute a sentence of one month to be served concurrently with the other sentence, which means that the total sentence falls from 4 years' to 2 years'.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

REGINALD THOMAS GENTRY

1955
Dec. 12

Bail—Prisoner with Long Record of Convictions.

Sentence — Preventive Detention — Not to be Imposed where Imprisonment more Appropriate.

Observations on the undesirability of granting bail to prisoners with long records of convictions.

Observations on the undesirability of imposing a sentence of preventive detention in a case where a long term of imprisonment is more appropriate.

Application for leave to appeal against sentence.

The applicant pleaded Guilty at the Soke of Peterborough Quarter Sessions on October 13, 1955, to garagebreaking and larceny and was sentenced by the Acting Chairman (Judge Lawson Campbell) to 8 years' preventive detention.

No counsel appeared.

THE LORD CHIEF JUSTICE. One of the matters of which the appellant complains is that a reference which he made to being discharged from the French Foreign Legion was ridiculed. I do not know whether it was ridiculed, but, as I shall show in a moment, it was true. There are, however, several other matters in this case to which I desire to call the attention of magistrates.

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Goddard L.C.J., Hallett J., Pearson J.

The applicant is 31 years of age and has eight previous convictions. He was discharged from the Irish Guards, in which he enlisted in February, 1940, because he was under age, and immediately after his discharge was sent to an approved school for larceny and fifteen cases of embezzlement. He was then sentenced to Borstal training, from which he was discharged in January, 1943. He joined the Royal Engineers, from which he was discharged in December, 1946, with a good character as a soldier, though in August, 1945, his service was interrupted by a sentence of 10 months' imprisonment for housebreaking. In July, 1953, he was released from a sentence of 4 years' corrective training, and then he seems to have joined the Merchant Navy and spent some time in that service. After that he got employment as a coal hawker, but embezzled £13 11s. 11d. A few days later, he and two men arrived at Peterborough from London intending to rob a public-house, but they seem to have been discouraged by the dogs there, and they went to a garage instead. There they broke in and took a van loaded with £240 worth of bacon, which was driven up to London. Fortunately, the applicant was arrested before he had time to dispose of the goods.

With all these convictions against him, the magistrates of the Soke of Peterborough granted him bail before he came before the court of quarter sessions. What was the result? As this court has pointed out over and over again, it is most dangerous to grant bail to a man with a long record of convictions, unless the magistrates think that there is a real doubt as to his guilt, because he is sure, if he is admitted to bail, to commit offences while he is on bail. The applicant was bailed on June 6, 1955, and promptly proceeded to embezzle £16 from a London laundry, and with that money he managed to abscond to France. It is only fair to say that apparently he got to the South of France and then tried to join the Foreign Legion, because he has sent to this court a travel warrant from Marseilles to Calais granted by the French military authorities, who for some reason or other refused to accept him for the

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Foreign Legion. At Calais he joined a ship as a merchant seaman, thinking that the ship was bound for South America but unfortunately for him, owing to bad weather, she put into an English port, and he was arrested.

He has now been sentenced to 8 years' preventive detention. It is very remarkable how prone quarter sessions are to passing sentences of 8 years' preventive detention, I suppose because this court has said that 8 years is the minimum sentence of preventive detention which ought to be passed unless in the case of an old person or for some special reason. That does not mean that every time a prisoner is qualified for preventive detention he should be sentenced to 8 years' preventive detention. In a case of this sort it does not necessarily follow that a prisoner should be sentenced to preventive detention; very often he should be sentenced to a long term of imprisonment. The object of passing a long sentence of preventive detention is to impose a longer sentence than the court would otherwise be prepared to give because the discipline, training, etc., of at any rate part of the period of preventive detention are rather different from those in the case of imprisonment. The idea of preventive detention is mainly the protection of the public. If courts continue to pass sentences of 8 years' preventive detention when they might be passing sentences of 8 years' imprisonment, the result will be that the establishments for preventive detention will be filled with prisoners who ought to be serving sentences of imprisonment. However, we cannot say in this case that the sentence of 8 years' preventive detention erred in principle. It certainly was not too long for a man of this character, who committed offences while on bail and had all these previous convictions, though he might just as well have been given a long sentence of imprisonment. The application is refused.

Application refused.

CIRCUIT CASE (WELSH CIRCUIT)

BEFORE

MR. JUSTICE McNAIR

1955
Nov. 16

R. *v.* COTTRELL

Road Traffic—Disqualification—Subsequent Good Behaviour—Application for Partial Removal—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 7 (3).

In 1954 the applicant pleaded Guilty to dangerous driving and was sentenced to a fine and also disqualified for driving motor-vehicles of any class for 5 years. In imposing the disqualification, the court intimated that it would be not out of keeping with the sentence to vary the disqualification after one year so as to permit the applicant to ride a motor-cycle, if the court were satisfied with the applicant's behaviour. After a year had elapsed the applicant, who had been of good behaviour in the meantime, applied to the court, under section 7 (3) of the Road Traffic Act, 1930, for the partial removal of the disqualification so as to permit him to ride a motor-cycle.

Held, that the subsection did not empower the court to vary the disqualification by removing it in part, and the application must, therefore, be refused.

Application at Assizes.

The applicant pleaded Guilty at Swansea Assizes in 1954 to dangerous driving and was sentenced to a fine and disqualified for driving motor-vehicles of any class for 5 years. The judge, when imposing the disqualification, intimated that it would not be out of keeping with the sentence to vary the disqualification after one year so as to permit the applicant to ride a motor-cycle, provided that the court were satisfied that the applicant had been of good behaviour during the period. On November 16, 1955, the applicant, who had been of good behaviour for a year, applied to McNair J. to vary the disqualification so as to permit him to ride a motor-cycle.

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McNair J.

John Rutter for the applicant.

J. F. Coplestone-Boughey for the Crown.

McNAIR J. [after stating the facts]. In the circumstances, if I felt that I had power to accede to the application, I should have been prepared to accede to it. It is an application to vary the disqualification imposed so as to permit the applicant to ride a motor-cycle, the general disqualification being sustained; it is not an application for the removal of the whole disqualification. The application is made under section 7 (3) of the Road Traffic Act, 1930, which empowers a person who by virtue of a conviction is disqualified for holding or obtaining a licence to apply after the expiration of 6 months for the removal of the disqualification. The subsection further provides, "on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the conviction or order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application." In that provision only two powers appear to be given to the court, *viz.*, a power to remove the disqualification, and a power to refuse the application. Under section 6, however, under which the original disqualification was imposed, there is an express power for the court, if it thinks fit, to limit the disqualification imposed to the driving of a motor-vehicle of the same class or description as the vehicle in relation to which the offence was committed. Although, in my opinion, the facts would justify the exercise of discretion in favour of varying the disqualification in the way in which the applicant asks—at any rate that would be in line with the views of the learned judge who imposed the disqualification—I do not feel that I have power to do anything other than remove the disqualification or refuse the application. Seeing that the facts do not, in my opinion, justify the removal of the whole disqualification, I exercise the alternative power given under the enactment and refuse the application.

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McNair J.

There may be cases where it may be convenient that the court should have power to vary a disqualification. On the construction of section 7 (3) it is, however, my opinion, as at present advised, that the section does not give a power of variation. It is, however, a question on which another mind might reach a different conclusion.

Application refused.

Solicitors: Edward Lewis, James & Possart, Cardiff, for the applicant.

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